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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. 610

INDIANA REVENUE BOARD, ET AL.
Petitioners,

vs.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, and RICUARD M. GIVAN and JOHN F. NEFF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA AND APPENDIX

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IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA AND APPENDIX

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF INDIANA

The Petitioners, INDIANA REVENUE BOARD, EDGAR D. WHITCOMB, Governor of the State of Indiana, as a Member of the Indiana Revenue Board, JOHN K. SNYDER, Treasurer of the State of Indiana, and as

a Member of the Indiana Revenue Board, TRUDY SLABY ETHERTON, as Auditor of the State of Indiana and as a Member of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE, JAMES O. MATHIS, as a Commissioner of the Indiana Department of State Revenue, THE STATE BOARD OF TAX COMMISSIONERS, JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPI, and DURWOOD STRANG, as Members of the State Board of Tax Commissioners of Indiana, and G. THOMAS BLANKENSHIP, acting as Inheritance Tax Administrator, pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Appellate Court, entered in these proceedings by the Appellate Court of Indiana on the 26th day of February, 1970, Petition for Rehearing denied by the Supreme Court of Indiana on June 1, 1970. Pres. Appendix p. 13.

OPINIONS BELOW

The Judgment and Order of commitment of the Appellate Court of Indiana, sitting as a Court of original jurisdiction in this case, entered on February 26, 1970, is reported at 255 N.E. 2d 833 and appears at Pres. Appendix pps. 1 to 10.

JUISDICTION

The order of the Supreme Court of the State of Indiana dismissing the Petition to Transfer, filed on March 18, 1970, was entered on April 10, 1970, without opinion, three judges opposed to transfer and one in favor. Judge Givan abstained in all entries made in this case. Pres. Appendix p. 11.

Petition for Rehearing was filed April 27, 1970, denied June 1, 1970, three judges opposed to rehearing and one in favor. Pres. Appendix p. 13. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

PARTIES

The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, ceased to exist on January 1, 1970. Its alleged successor in interest is Respondent, City of Indianapolis. Richard M. Givan and John F. Neff, although not parties below, were granted judgment by the court below and received $837,536.57 of tax funds from the General Fund of the State Treasury as a contingent fee.

G. Thomas Blankenship, acting as Inheritance Tax Administrator, succeeded Richard A. Green on July 1, 1970.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, § 1:

> "*** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 10, Sec. 3, Indiana State Constitution:

> "Appropriations.—No money shall be drawn from the Treasury, but in pursuance of appropriations made by law."

Article 10, Sec. 1, Indiana State Constitution:

"Assessment and taxation.—The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

Article 6, Sec. 1, Indiana State Constitution:

"Secretary, auditor, and treasurer of state.—There shall be elected, by the voters of the State, a secretary, an Auditor and a Treasurer of State, who shall, severally, hold their offices for two years. They shall perform such duties as may be enjoined by law; and no person shall be eligible to either of said offices, more than four years in any period of six years."

Article 3, Sec. 1, Indiana State Constitution:

"Three departments.—The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

STATUTES

Although these Petitioners do not request a constitutional construction of any statute, there are various Indiana statutes which must be included in order that the questions here presented may be understood. These Petitioners, therefore, resubmit, in 1st Appendix C, the following statutes:

House Enrolled Act No. 1818, Acts of 1967 General Assembly (never published); p. 70;

Ch. 20, Acts of 1969 repealing House Enrolled Act No. 1818 *ib.*; p. 71;

Section of the mandate statute dealing with mandate judgment. Acts of 1881 (Spec. Sess.) Ch. 38 § 810 as amended and found in Burns' Ind. Stat. Ann. § 3-2205; p. 72;

Statutes restricting Auditor's warrants:

1. Acts of 1905, Ch. 169 § 502; Vol. 4 (1956 Replac.) Burns' Ind. Stat. Ann. § 10-3715; p. 72;
2. Acts of 1859, Ch. 138, §§ 7-8 as amended and found in Vol. 10, Pt. 1 (1964 Replac.) Burns' Ind. Stat. Ann. §§ 49-1809-10; p. 72, 73.
3. Acts of 1852, Ch. 7 § 2 as the same appears in Vol. 10, Pt. 1 (1964 Replac.) Burns' Ind. Stat. Ann. § 49-1702 (5); p. 73;

Statutes dealing with substitution of parties. Acts of 1881 (Spec. Sess.) Ch. 38 §§ 23 and 848; Vol. 2, Pt. 1 (1967 Replac.) Burns' Ind. Stat. Ann. §§ 2-227-28; p. 73); Portion of statute providing for removal of cases to the Indiana Appellate Court; Acts of 1965 (2nd Spec. Sess.) Ch. 7; Vol. 2, Pt. 2 (1968 Replac.) Burns' Ind. Stat. Ann. § 3-2129; p. 74.

Statute terminating the corporate existence of the Mass Transportation Authority of Greater Indianapolis, a municipal corporation; Acts of 1969, Ch. 173 § 1003 as found in Vol. 9, Pt. 3 (1963 Replac.) Burns' Ind. Stat. Ann. § 48-9353; p. 75.

STATEMENT OF CASE

The period covered by this petition commences with the Order and Opinion of the Court of December 16, 1969, and

continues through to the termination of the contempt proceedings. The Statement of the Case in the prior petition for certiorari filed on the 11th day of June, 1970, No. 1680, covers all proceedings up to and including December 16, 1969.

All of the Petitioners have an interest in the questions here raised although Trudy Slaby Etherton is the Petitioner primarily concerned with the Court's action. The Petitioners request that this petition be considered with the Petition filed on the 11th day of June, 1970, No. 1680. Inasmuch as this petition covers part of the same proceedings, and the same parties, as Petition for Certiorari No. 1680 filed on June 11, 1970, and for convenience of all concerned, the separate Appendices filed with the prior petition will be utilized and referred to as "1st Appendix A, B, or C".

Summary of Prior Proceedings
History of the Act

Before January, 1967, the inheritance tax received by the State became a part of the General Fund by statute.

In February, 1967, the House and Senate of the State of Indiana passed House Enrolled Act 1818 which provided for a special account for a return from the State to each county of 90% of the inheritance tax received from the county, 1st Appendix C, p. 70. In Marion County the Mass Transportation Authority, a municipal corporation, was designated by the statute as the recipient of Marion County's share of the inheritance tax so returned. The balance of the tax, retained by the State, was to be then credited to the General Fund, 1st Appendix C, p. 71.

House Enrolled Act 1818 was passed on the last day of the legislative session and the Governor did not act upon

the bill or file the bill in the Office of the Secretary of State. The bill was never published or promulgated and, under Indiana law and custom since the Constitutional Convention of 1851, as well as by virtue of a prior Indiana Supreme Court decision (*State ex rel Owens v. 40th Judicial District*, (1931), 202 Ind. 354, 174 N.E. 423). was considered to have been vetoed by the Governor.

Mandate Proceedings

A Mandate action was filed by the Respondent attorneys for the Mass Transportation Authority on July 26, 1967, attacking the Governor's veto and claiming that House Enrolled Act 1818 had become the law of the State and asking that the incumbent officials be ordered to perform their duties under said Act.

On December 31, 1968, the Appellate Court, sitting as a trial court, entered its opinion reversing the law dealing with the Governor's veto power and holding that House Enrolled Act 1818 was the law and had been the law of the State since January of 1967, and found that the M.T.A. should have judgment, 1st Appendix B1, p. 25.

On December 31, 1968, the inheritance tax collected during 1967 and 1968 had been handled in conformity with the 1931 Act, Burns' Ind. Stat. Ann. § 7-2414. The Inheritance Tax Commissioner's certificates provided for by H.E.A. 1818 had not been issued and the fund had never been established. 1st Appendix C, p. 70.

The Petitioner, Trudy Slaby Etherton, entered into her term of office on December 1, 1968, and on that same day, John P. Gallagher's term of office expired. Respondent attorneys for Mass Transportation Authority did not cause her substitution as a party defendant before entering judgment or at any other time in this proceedings.

After Mandate Opinion of December 31, 1968

A Petition to Transfer was filed with the Supreme Court on January 10, 1969, which was denied on February 6, 1969 with opinions, 1st Appendix, p. 42. The vote was two judges for transfer, two against transfer and one abstaining.

The State Legislature enacted Ch. 20, Acts of 1969, which retroactively repealed House Enrolled Act 1818, on the 12th day of February, 1969, 1st Appendix C, p. 71. The Appellate Court declared Ch. 20, Acts of 1969, to be a valid retroactive repeal in all respects except as to its judgment of December 31, 1968, in favor of the Mass Transportation Authority, a municipal corporation, 1st Appendix A, p. 1 at 10.

Collection Proceedings

The Opinion of December 31, 1968, declared House Enrolled Act 1818 an enacted statute but did not mandate the named officials or the then incumbent Auditor to act under said statute nor, in the absence of evidence, determine a sum certain due to the M.T.A. by virtue of said judgment.

On February 28, 1969, Respondent attorneys filed for the M.T.A. a Verified Petition for Order for Payment of Funds pursuant to Judgment, attaching documents purporting to establish a sum certain. On the same day Respondent attorneys filed Notice of Intention to Hold Attorneys Lien attaching a purported contract with the Mass Transportation Authority for a contingent fee of 10% of the "first year's Marion County inheritance tax revenue" received by the Authority as a result of counsel obtaining a court determination that Act 1818 of the 1967 Indiana General Assembly is in fact law.

Petitioners filed a Motion to Dismiss said Verified Petition for Order for payment of funds on April 11, 1969. Stating that this case had become a new and distinct action against the Sovereign State of Indiana contrary to Article 4, Section 24 of the Indiana Constitution; that the Mass Transportation Authority, as a municipal corporation, had not been given the power to maintain the suit; that House Enrolled Act 1818 had been repealed; and called to the attention of the Respondents that the Auditor of State was not included as a defendant.

On April 21, 1969, Respondent Attorneys filed an Answer in Opposition to the Motion to Dismiss and a brief. Petitioner Etherton, nor any of the other then incumbent officials were substituted nor was substitution requested.

APPELLATE COURT'S MANDATE ORDERS

On October 21, 1969, the Appellate Court, sitting as a trial court, overruled Petitioners' Motion to Dismiss and entered its first mandate. This was followed by three other mandate orders, the last of which was filed on December 16, 1969, with the Court's Opinion, 1st Appendix A, p. 1 to 24.

Contempt Proceedings

The mandate of December 16, 1969, required the Auditor to issue her warrant on or before December 22, 1969, 1st Appendix, p. 23. The Auditor, Trudy Slaby Etherton, filed a response on December 22, 1969, showing additional reasons why she could not issue the warrant: On December 23, 1969, Respondent attorneys for the Mass Transportation Authority filed their Verified Information and Affidavit for Rule to Show Cause.

On February 5, 1970, the Appellate Court issued its Rule to Show Cause and require Trudy Slaby Etherton, Auditor, to appear on the 16th day of February to show cause why she should not be punished and committed to jail for her contempt of the court by failing to comply with its order.

On February 16, 1970, Petitioners filed their Answer to the Court's Rule to Show Cause and introduced evidence to show that there was no money in the fund to be charged as provided in House Enrolled Act 1818. After completion of evidence and argument, the Appellate Court set the matter for ruling on February 26, 1970.

Interim Orders

Although the court had held, in its opinion of December 16, 1969, that this had not become an action against the State of Indiana, (or at least that sovereign immunity was not a defense) the Appellate Court did issue an order on February 24, 1970, under Rule 70A of Indiana Rules of Procedure, to the bank presidents of three (3) banks known to be depositories of State Treasury Funds. Said order was issued at 12:00 noon pursuant to Respondent attorneys' Petition filed at 11:45 a.m. on the same day. The order, as amended, directed said bank presidents to pay over Twelve Million ($12,737,338.97) Dollars of State Funds to the Clerk of the Appellate Court for distribution as per the order of December 16, 1969.

The court apparently believed that the constitutional office of State Auditor, and also the Office of State Treasurer, could be by-passed and their powers usurped to obtain the money from the State Treasury and that the Respondents had a money judgment against the State to be satisfied pursuant to Rule 70A.

Contempt Judgment.

On February 26, 1970, Trusty Slaby Etherton, Auditor of the State of Indiana, was committed to jail for failure to obey the mandate of December 16, 1969, 2nd Appendix A, p. 7.

Petition for a Stay Pending Appeal was refused by the Appellate Court on February 26, 1970, (Court Reporter's Transcript).

Petition for Stay Pending Appeal was presented to the Supreme Court, on February 26, 1970, and on the 3rd day of March, 1970, granted a two day stay to enable the Auditor to make payment.

On March 4th, 1970, Petitioner Etherton issued her warrant under protest and registered at the same time a protest by the State Board of Finance, 2nd Appendix, p. 15.

HOW THE FEDERAL QUETSIONS WERE RAISED

Questions 1 and 2 set out in the petition filed on June 11, 1970, and assigned No. 1680, were presented to the Appellate Court in Petitioners' Answer to Rule to Show Cause filed February 16, 1970, and to the Supreme Court in Petition to Transfer, filed on March 18, 1970, and Petition for Rehearing, filed on April 27, 1970. The orders of the Supreme Court dismissing the Petition to Transfer and denying the Petition for Rehearing are set out in the Present Appendix, p. 14.

Questions A and B, of this petition, or questions with the same content, were presented to the Appellate Court

on various occasions, most recently in Petitioners' Answer to the Rule to Show Cause of February 16, 1970, and to the Supreme Court of Indiana in Petition to Transfer filed March 18, 1970, and Petition for Rehearing filed April 27, 1970.

Question C was presented in the Petition for Rehearing filed April 27, 1970, when it became apparent that the Supreme Court of Indiana would not otherwise accept the case for review.

QUESTIONS

A. Whether the order of the Appellate (trial) Court of December 16, 1969, enforced by coercive action on February 26, 1970, was in excess of the court's jurisdiction and repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution in the following particulars:

1. Petitioner Etherton was in office on December 1, 1968, but was not served with notice or given a hearing prior to the decision of December 31, 1968, nor was she substituted in this action for her predecessor in office as required by the Indiana Statutes;

2. Said mandate required the issuance of the Auditor's warrant for the benefit of a relator that had ceased to exist and for said relator's attorneys who were not parties and had not litigated their right to fees;

3. The court exercised legislative powers and authority in the issuance of its mandate and the coercive action of February 26, 1970?

B. Whether the Court's action of February 26, 1970, holding Trudy Slaby Etherton guilty of contempt, and committing her to jail, for failure to obey the Court's mandate of December 16, 1969, for the reason that it required her to violate her oath of office, is repugnant to the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution?

C. Whether the Petitioners' inability to obtain review of any judgment or order entered in this cause, including the judgment of February 26, 1970, in a state that extends the right of appeal to all litigants, is repugnant to the equal protection clause and due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution?

REASONS FOR THE WRIT

Extension of the constitutional guarantees of due process and equal protection to public employees and public officers has been denied on various theories, including: the right-privilege concept, enunciated in *Davis v. Massachusetts*, 167 U.S. 43, and the concept that officials represent the sovereign, and that the Fourteenth Amendment was to protect persons against action by the sovereign.

In this case, John P. Gallagher, State Auditor, was sued, with other State officers, by a municipal corporation for a distribution of tax funds. Although this was a mandate action, Trudy Slaby Etherton, as Gallagher's successor in office, was never given notice nor an opportunity for hearing although she took office before the decision on the merits. The finding for the Plaintiff, Mass Transporta-

tion Authority, was entered on December 31, 1968 and Trudy Slaby Etherton was joined when the mandate was issued on October 21, 1969 by the Court *sua sponte* without motion or any request by Respondent. She was eventually found guilty of contempt and sent to jail.

She claims lack of due process and lack of equal protection in that she was forced by coercion to violate her oath of office by making, under coercion, a distribution of tax funds contrary to the United States Constitution, the Indiana Constitution, and Indiana State Statutes. She also claims that she was not given notice nor an opportunity for hearing on the merits; nor was she ever joined as a party, as required by Indiana law.

With the trend toward abolishment of sovereign immunity, and Indiana is no exception, standards for due process as applied in mandate and injunction cases against public officers should be reviewed and guidelines set.

Where the action is against the officer and not the office, as in mandate and injunction, it should be made clear that the constitutional guarantees are available to the officer in case of unfair or abusive action by the courts.

Finally, in a state in which the right to an appeal is extended to all litigants, the failure of the state judicial machinery to provide judicial review in this case, particularly where basic constitutional and statutory fiscal questions are involved, constitutes a breach of judicial duty and a denial of Petitioner's Constitutional rights.

A. (1) Notice, right to be heard, and substitution under Indiana law, have been commented on in the Petition for a Writ of Certiorari filed in this Court on June 11, 1970, and assigned No. 1680. Petitioners incorporate the com-

ments appearing on pages 20 to 23 into this petition by reference. These few additional comments seem pertinent.

The decision below is inconsistent in principle with *Snyder v. Buck*, (1950) 340 U.S. 15.

Although there is no question of abatement, there is as serious an abuse of procedural rules as existed in *Snyder v. Buck, id.*, where this court followed the procedural statute supplied by Congress.

These Petitioners advised Respondents and the Trial (Appellate) Court of the failure to substitute Trudy Slaby Etherton as Auditor in their Motion to Dismiss (memorandum) filed April 4, 1969. This was in ample time for the Respondents to make the substitution and time had not then run against opening the decree of December 31, 1968.

In spite of the pleadings, exhibits and testimony at the hearing of February 16, 1969, showing the Court that Trudy Slaby Etherton was State Auditor prior to the Judgment of December 31, 1968, the Court has refused to recognize this. As late as February 26, 1970 in *State ex rel M.T.A. v. the Indiana Revenue Board et al*, 255 N.E. 2d, 833, the Court still showed John P. Gallagher as Auditor of the State of Indiana on December 31, 1968, in a footnote. Pres. Appendix, p. A-1.

It was Respondents' duty to substitute Trudy Slaby Etherton for John P. Gallagher as Auditor prior to Judgment, and she was "entitled to the same notice, to be given in the same manner as required for defendants in the commencement of an action". Acts 1881 (Spec. Sess.), Ch. 38, Sec. 848, Burns' §2-228. 1st Appendix C, p. 74.

According to the terms of the Acts of 1881 (Spec. Sess.) Ch. 38, Sec. 810, as amended, Burns' § 3-2205, only "all defendants duly served with process or notified by publi-

cation in such action. . . .'' are subject to attachment, fine or imprisonment for disobedience of the Writ. 1st Appendix C, p. 72.

The above statutes were in effect prior to and at the time of Judgment on December 31, 1968 and at the time of the Court's Mandate on December 16, 1969. On January 1, 1970 new Indiana Rules of Procedure went into effect and Burns' §§ 2-227 and 2-228 were repealed as of that date.

A. (2) Relator Mass Transportation Authority ceased to exist on January 1, 1970.

Coercion by civil contempt and attachment, in a mandate action, is for the benefit of the Relator. See *McCrone v. United States*, (1938), 307 U.S. 61, where the Court said:

> "While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, *serves only the purposes of the complainant* and is not intended as a deterrent to offense against the public." (Our emphasis)

Where there is no party entitled to be benefited, proceeding with a civil contempt action is meaningless except as punishment or an exercise of judicial will repugnant to concepts of fairness and justice.

On January 1, 1970, the day the Mass Transportation Authority ceased to exist, the Indiana Supreme Court adopted Trial Rule 19 F(3), Indiana Rule of Civil Procedure, which reads as follows:

> "A judgment for or against a governmental organization shall also bind affected or successive representatives of such organization. When a governmental rep-

> resentative is named as a party in his individual name or in his individual name along with his official title, the judgment, in an appropriate case, may bind him in his individual capacity but no judgment against him in his individual capacity shall be rendered against him unless he is so named. No action against a governmental organization or against a governmental representative in his official capacity shall be abated, affected or delayed because of the death, incapacity or replacement of a named or unnamed governmental representative, or because of the fact that the name, functions or existence of the governmental organization have been altered or terminated. In either case the action shall proceed without substitution of successor who shall be bound by the judgment in their official capacity."

The above rule, in so far as it is applied to mandate and injunction suits against officials such as the State Auditor, should be considered offensive to due process.

With the gradual abolition of sovereign immunity as a defense the rules pertaining to notice and hearing where public officials are subjected to mandate and injunction should be re-examined. See *Snyder v. Buck* (1950), 340 U.S. 15, Dissenting Opinion, pages 28-31.

Under the above trial rule and without substitution of parties so that these Petitioners could object, the Trial (Appellate) Court provided for the payment of the House Enrolled Act 1818 Funds to the City of Indianapolis, a municipal corporation. The City of Indianapolis, which does not include all of Marion County as the Mass Transportation Authority did, was considered by the Court to be its successor. It is true that the powers, obligations, and duties of the M.T.A. were transferred to the Department of Transportation of the City of Indianapolis and also true that the assets of the Mass Transportation

Authority were transferred to a financial department of the City of Indianapolis. There is no specific disposition of the Judgment entered in this proceedings on December 31, 1968. Legislative intent appears to reject the concept that the City of Indianapolis succeeds to the Mass Transportation Authority's position in this case.

The 1969 Legislature repealed House Enrolled Act 1818 by Chapter 20, Acts 1969, retroactively without exception. The same Legislature later created the City of Indianapolis and its Department of Transportation and also terminated the Mass Transportation Authority, all without mention of this proceedings. In Indiana, counties and other municipal groups have only those rights specifically granted by the Legislature or necessarily implied in an express grant. Citing *Local Union No. 26, National Brotherhood of Operative Potters v. City of Kokomo* (1937), 211 Ind. 72, 5 N.E. 2d 624; *Southern Wire Co. v. Harpe* (1945), 223 Ind. 124, 58 N.E. 2d 346. Further, the grant of powers is strictly construed against the municipal corporation. *City of Elkhart v. Lipschitz* (1905), 164 Ind. 671, 74 N.E. 528; *Local Union No. 26, supra.*

In looking for legislative intent all of the acts passed at the same session of the Legislature dealing with the same subject should be considered.

It is not rational to suppose that the Legislature that passed Chapter 20, Acts of 1969, which retroactively repealed House Enrolled Act 1818 of 1967 without a saving clause intended that the new City of Indianapolis should succeed to and enjoy a distribution of funds under that account.

Acts dealing with the same subject matter passed by the same session of the Legislature must be construed *in pari materia*, *(Beamer v. Waddell* [1943], 221 Ind. 232, 45

N.E. 2d 1020), and it is presumed that the Legislature knows the existing law when it enacts legislation. *McClarnon v. Stage* [1939], 215 Ind. 157, 19 N.E. 2d 252. If the Mass Transportation Authority had a judgment right to the distribution of certain tax money under House Enrolled Act No. 1818 those enactments concerning the distribution of tax money are in *pari materia* with the statutes creating and giving certain powers to the Consolidated City of Greater Indianapolis.

The trial (Appellate) Court, in continuing this proceedings through to its Judgment of Contempt and Commitment without a Relator and without providing an opportunity for these Petitioners to object to the successor party, abused the concept of a civil contempt and deprived the Petitioners of an opportunity to question the validity of the new parties' claim as a successor.

A. 2 (b) The Judgment granted attorney fees to persons not parties.

The Court, on February 26, 1970, coerced compliance with a mandate which granted judgment to the Mass Transportation Authority's attorneys, Respondents Richard M. Givan and John F. Neff. These attorneys were neither parties nor had their contingent fee been litigated in this action.

A notice of intention to hold a lien was filed in the Clerk's Office, in the customary fashion, with a purported contract for a contingent fee.

Ordinarily, the money would be paid to the clerk for the benefit of the party taking judgment and would be held by the clerk until the parties either agreed or litigated the fee.

In Indiana, unless there is a statute authorizing the Court to allow fees pursuant to proof, such an order is void. In such a case the Indiana Supreme Court in *Donech v. Donech* (1938) 214 Ind. 559, pps. 562, 564; 16 N.E. 2d, 877, pps. 879, 880 said:

> "'The rule is well settled that a judgment or order for the payment of fees directly to an attorney for one of the parties is a judgment in favor of persons not parties to the suit, and for that reason irregular and void.'"

In *Donech, id.*, there had been a civil contempt proceedings. With reference to the contempt proceedings, the Court said at p. 880 of the N.E. report:

> "'The court having no power or jurisdiction to enter such a judgment the information filed is insufficient to sustain a contempt proceeding.'"

Including attorney fees in a mandate without evidence was held invalid in *Sears Roebuck & Co. v. State ex rel Thelma Pearl Ryan*, (1968), 248 Ind. 169, 225 N.E. 2d 175. The void portion of the order is not separable from the whole, rendering the entire order void.

Since the order is void, the contempt cannot stand. *Donech, supra.*

The Sears case also stresses the necessity for strict compliance with the mandate statute. See Burns' Ind. Stat. §3-2205, 1st Appendix C, p. 72.

The City of Indianapolis had no opportunity to object to the $827,586.59 fee, if its officials so desired, because the City of Indianapolis was never a party to this action. The Mass Transportation Authority could not object after January 1, 1970 because it had ceased to exist.

Neither the tax payers nor the State Board of Accounts, which reviews the propriety of municipal expenditures, can question the propriety of this contingent fee contract. It makes no difference if it is *ultra vires* or excessive. It has been adjudicated.

The mandate was in excess of the Court's jurisdiction and, therefore, void. The coercion of the Auditor deprived her of her liberty and injured her in her occupation as a public servant.

A. 3. The Court Exercised Legislative Power and Authority.

The trial (Appellate) court held on December 16, 1969 that because the rights involved were public rights, Ch. 20, Acts 1969, (1st Appendix C, p. 71), was a valid repeal in all respects except as to the judgment of December 31, 1968. The Court based its holding on the separation of powers provided for by Article 3, § 1, Indiana Constitution (this petition p. 4).

Accepting this for purposes of argument, does the fiction that House Enrolled Act 1818, Acts 1967 (1st Appendix C, p. 70) is in existence only as to the judgment of December 31, 1968, include the existence of legislative authority for the Auditor's warrant, contrary to the legislative intent?

The repeal acts' revocation of the Auditor's authority under H.E.A. 1818 was general and retroactive. The Court's application of the separation of powers concept should also extend to the legislature and its creature, the Auditor, under Article 6, § 1 of the Indiana Constitution (this petition p. 4).

An orderly concept of government and the separation of powers doctrine requires an answer. The Petitioners

believe that an objective application of the separation of powers concept under the Court's holding requires that if the judgment stands as a product of the judiciary, the Auditor's authority flowing from the legislature is revoked, and that the judiciary exceeds its powers in supplying legislative authority to the Auditor.

We find no Indiana cases on this point; however, some state courts have considered the question. Where defendants are ordered to perform certain duties enjoined by a specific statute and thereafter the statute is repealed, the proceedings will terminate.

> 55 C.J.S. Mandamus § 41, p. 72; See also cases there cited, i.e. *State v. Crawford*, 105 S. 446, 90 Fla. 264; *Culcomper, Ill.* Mayor, etc., 60 Iowa 156, 14 N.W. 214.

The same rule of law is stated at 55 C.J.S. §358, p. 626, where it is stated:

> "A repeal of the law under which the relator's right to the performance of a duty by respondent accrued justified respondent's refusal further to obey the writ." *Mooney v. Drainage District No. 1 of Richardson County*, 274 N.W. 467, p. 474. Also *Tubbs v. Linn*, 70 N.W. 2d 372, p. 377.

The question does not properly arise where privately vested rights are involved because the repeal statute would be unconstitutional for all purposes.

The Petitioners maintain that exercise of and supplying of legislative powers and authority to the Auditor by the judiciary in order to force issuance of the Auditor's warrant is an abuse of due process.

B. Trudy Slaby Etherton's oath, as Auditor, was ". . . that I will support the Constitution of the United States, the Constitution of the State of Indiana and that I will

faithfully and impartially discharge my duties as *Auditor of State, State of Indiana*, to the best of my skill and ability, so help me, God." 1st Appendix C, p. 76.

The Auditor swore that she would uphold the Constitutions of the United States and of the State of Indiana. The Constitution of the United States, Amendment XIV, § 1, provides that "No state shall . . . deny to any person within its jurisdiction equal protection of the laws." But the mandate of December 16, 1969 provided for a distribution of tax money from the General Fund of the Treasury which would favor the tax payers in one county and discriminate against the tax payers in 91 counties. The Auditor protested the Court's order on this basis in a petition for rehearing before the Supreme Court of the State prior to the contempt proceedings, in her answer to rule to show cause filed February 16, 1970 with the Appellate Court, and in both the petition for transfer and petition for rehearing after the contempt proceedings. She was required to issue her warrant in violation of her oath or accept imprisonment.

The equal protection provision applies to Article 10, § 1 of the Indiana Constitution which provides that "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation".

The Auditor's office is a constitutional office provided for in Article 6, § 1 of the Indiana Constitution where her duties provide that she ". . . shall perform such duties as may be enjoined by law. . . ." The Indiana Constitution also provides in Article 10, § 3 that "No money shall be drawn from the Treasury but in pursuance of appropriations made by law". The Legislature has directed by one criminal statute and three civil statutes that she shall not draw a warrant unless there be money in the Treasury be-

longing to the *particular fund upon which* it is drawn and in conformity to appropriations made by law. These statutes are Burns' §10-3715, Burns' §49-1809, Burns' § 49-1810, Burns' § 49-1702, all found in the 1st Appendix, pps. 72 and 73.

House Enrolled Act 1818, Acts 1967, upon which the Court's mandate was based (1st Appendix C, 70) provides for an appropriation from a special fund, i.e., the receipts of the previous quarter, and further provides that upon certificate supplied by the Inheritance Tax Administrator on the last day of April, 1967, and thereafter on or before the last day of July, October, January, and April the Auditor of the State was to pay ninety per cent (90%) of the inheritance tax received back to the counties that paid it in, and the balance of the tax was to be then credited to the State General Fund.

House Enrolled Act 1818 was repealed retroactively by Chapter 20, Acts of 1969, one month and twelve (12) days after the Court's Judgment of December 31, 1968.

The mandate and opinion of the Appellate Court on December 16, 1969 held the repeal ineffective, that there was an appropriation in H.E.A. 1818 but ignored the provisions of H.E.A. 1818 concerning payment, holding that all inheritance tax money paid in was by prior law a part of the General Fund of the Treasury.

The Auditor's duties enjoined upon her by law required that she refuse to issue her warrant. Under Burns' § 49-1702, (1st Appendix C, p. 73) she believed that she was directed by the following language:

> "Duties. He shall . . . Fifth. Examine and liquidate the claims of all persons against the state in cases where provisions for the payment thereof shall have

been made by law; *and when no such provisions, or an insufficient one, has been made, to examine the claim, and report the facts, with his opinion thereon, to the legislature;* and no allowance shall be made to refund moneys from the treasury without his statement either for or against the justice of the claim." (our emphasis)

She also knew that there was no money in the fund established by H.E.A. 1818, and that she was forbidden by law to issue her warrant where there was no money belonging to the proper fund to be charged. Burns' 49-1809.

All of the above was repeatedly pointed out to the Appellate and Supreme Courts of the State of Indiana. The Appellate Court ignored her statements and the proof offered by affadavit and sworn testimony at the hearing of February 16, 1970, and insisted that she draw her warrant on the General Fund of the State Treasury although there was no appropriation against the General Fund.

In each instance above, the Appellate Court by its coercive action required her to violate her oath of office or go to jail.

Mandate actions in their nature are enforced only when the Relator has a clear and present right and the defendant a clear and imperative duty. *Gibson v. State ex rel. Sorrells* (1968), —Ind. —, 240 N.E. 2d 544.

Mandate will not be used to require performance of a discretionary duty in a particular way. *State ex rel. Cedar Creek School Tp. v. Curtin*, (1940) 217 Ind. 190, 26 N.E. 2d 909.

The Court, in requiring the Auditor to perform acts which violated her oath of office and the legislative di-

rective, acted in excess of its jurisdiction and denied due process to Petitioner Etherton, unfairly depriving her of liberty and injurying her reputation in her chosen occupation as a public servant.

C. Inability to Obtain Review.

This case was removed to the Indiana Appellate Court under Acts, 1965 (2nd Spec. Sess.) Ch. 7, Burns' Sec. 3-2121-3-2129, from a Marion County Superior Court for trial by the Appellate Court.

Because the removal statute provides for review by transfer to the State Supreme Court, and further because the five-judge Supreme Court was split two for transfer and two in opposition and one abstaining in each attempt to transfer until the petitions to transfer the contempt proceedings, when the judges split, three for dismissal, one for transfer, and one abstaining (the vote was also the same on the petition for rehearing). This case, by virtue of the denial to transfer, has been affirmed by the Supreme Court in all of its aspects. However, under Indiana law, as declared by the Court in *State ex rel. Mass Transp. Auth. v. Indiana Revenue Bd.*, (1969) 254 N.E. 2d, p. 1, the result of the affirmance is that the Appellate Court's decision and rulings have become the law of the case, presumably having no effect on previous Supreme Court rulings.

State ex rel Owen v. Fortieth Judicial District (1931), 202 Ind. 354, 174 N.E. 423 holding contrary to this case as to the meaning of Article 5, Sec. 14 of the Indiana Constitution (in Opinion, 1st Appendix B. 1, p. 28), is still the law in this state, except for this case.

Under *State ex rel Owen v. Fortieth Judicial District, supra,* House Enrolled Acts 1818 has never had a valid existence.

Other rulings by this Court as to appropriations, the separation of powers justification for sustaining the judgment, the waiver of notice, sovereign immunity, and other rulings are only applicable to the boundaries of this case, in no way binding on the State Supreme Court or other courts.

After the payment of over twelve million dollars ($12,000,000) to Respondents, the basis for this payment could be changed next month. Realizing this danger and in fear of the effect of random and contradictory decisions, Petitioners filed a petition for appointment of judges on December 16, 1969. The purpose of this petition was to make the Supreme Court aware of the procedure problems and in interest of uniformity in the interpretation and application of the law. The petition was denied. See 254 N.E. 2d, p. 1, *supra*.

The constitutional and statutory questions in this case are significant and Petitioners' inability to obtain review seems to them to point out a procedural defect that denied them, and particularly Petitioner Etherton, equal protection and to violate the principles set out in *Warren v. Indiana Telephone Co.* (1940), 217 Ind. 93, 26 N.E. 2d 399, pps. 405-408.

CONCLUSION

For the above reasons Petitioners respectfully suggest that a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of Indiana.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of the State of Indiana
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Indianapolis, Indiana 46204

RICHARD C. JOHNSON
Chief Deputy

WENDELL C. HAMACHER
Chief Counsel—Staff

PRESENT APPENDIX

STATE of Indiana, on the relation of the MASS TRANSPORTATION AUTHORITY OF GREATER INDIANAPOLIS, A MUNICIPAL CORPORATION, Plaintiff-Petitioner,

v.

INDIANA REVENUE BOARD, Edgar D. Whitcomb, as a Member of the Indiana Revenue Board, John K. Snyder, Treasurer of the State of Indiana, and as a Member of the Indiana Revenue Board, Trudy Slaby Etherton, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board, Indiana Department of State Revenue, the State Board of Tax Commissioners, Joseph D. Geeslin, Jr., Carleton L. Phillippi, and Durwood Strang, as Members of the State Board of Tax Commissioners of Indiana, Richard D. Green, as Inheritance Tax Administrator, Defendants-Respondents.*

No. 767A39.

Appellate Court of Indiana, In Banc.

Feb. 26, 1970.

Contempt proceeding against state auditor for refusal to comply with prior court order. The Appellate Court

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* On December 31, 1968, the date of the judgment in this case, the named defendants were then incumbent officeholders and were named were named in their capacities as such officeholders, viz: Roger D. Branigin, as a Member of the Indiana Revenue Board; John P. Gallagher, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board; William L. Fortune, Commissioner of the Indiana Department of State Revenue; and Larry P. Mohr and Herbert C.

held that state auditor was guilty of contempt in refusing to draw warrant payable to clerk of Appellate Court as ordered in case wherein it was determined that state officers must comply with act providing for distribution of 90% of inheritance tax funds to mass transportation authority of county and auditor must be committed to custody of sheriff and held in county jail until such time as she might purge herself by drawing such warrant.

Order accordingly.

See also, Ind.App., 253 N.E.2d 725.

1. Constitutional Law

Judiciary has right to review acts of Congress and actions of Executive to determine their constitutionality.

2. Constitutional Law

Constitution is supreme in case of conflict with acts of Congress or Executive.

3. Constitutional Law

Court is guardian of Constitution.

4. Constitutional Law

Courts have exclusive responsibility and duty to interpret the law, the Constitution, statutes of General Assembly and case law and to apply interpretation to case at issue.

Holmes, as Members of the State Board of Tax Commissioners of Indiana; and T. Michael Smith, as Inheritance Tax Administrator. This court takes judicial notice that these named defendants are no longer in office, and the court, on its own motion has substituted the present incumbents in office as the nominal defendants.

5. Constitutional Law

No privilege protects elected public official from being disciplined by court for nonfeasance, misfeasance or malfeasance in office.

6. Evidence

Appellate court took judicial notice that certain defendants named as state officers were no longer in office.

7. Mandamus

State auditor was guilty of contempt in refusing to draw warrant payable to clerk of Appellate Court as ordered in case wherein it was determined that state officers must comply with act providing for distribution of 90% of inheritance tax funds to mass transportation authority of county and auditor must be committed to custody of sheriff and held in county jail until such time as she might purge herself by drawing such warrant.

Donald E. Bowen and Ronald S. Lieber, Indianapolis, for plaintiff-petitioner.

Trudy Slaby Etherton, in pro. per., and by Theodore L. Sendak, Atty. Gen., Richard C. Johnson, John Carmody, Sheldon A. Breskow and Wendell C. Hamacher, Deputy Attys. Gen., for defendants-respondents.

PER CURIAM.

Because of the extremely complex issues in this case, it has become apparent to us that the basic premises on which the decision of this court rests have been obscured by a great deal of misguided oratory, and for that reason we would like to briefly review our position.

[1-4] In the case of *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), decided by the Supreme Court of the United States, a basic and inherent right of the judiciary was established, that being the right to review acts of Congress and actions of the Executive to determine their constitutionality. The effect of that decision was to establish that the *Constitution* is supreme in case of conflict, and, further, that the *court* is guardian of the Constitution. The courts have traditionally in a democratic form of government had the *exclusive* responsibility, in fact the *duty*, to interpret the law—the Constitution, statutes of the General Assembly, and case law—and apply the interpretation to the case at issue.

It should be understood that the court does not initiate disputes—it settles controversies which have arisen between *parties*. Thus, in the instant case, the plaintiff-petitioner, Mass Transportation Authority, sought a remedy against State officials. The controversy was duly submitted to the courts and eventually was heard and *decided* by this court.

While the issues themselves may be technical and complicated, the method of deciding them is not. This court reviewed the statutes, the applicable constitutional provisions and the applicable cases. The court then applied its findings and interpretations and held in favor of the plaintiff-petitioner, Mass Transportation Authority. To arrive at this decision this court did not *invent* law to support its decision; it did not *contrive* by means of judicial fiat to deprive one of the parties of their rights; it did not knowingly or willingly provoke one of the parties to take the law into their own hands.

It seems clear beyond need for supporting authority that this court has done *nothing more* than it is bound by the Constitution of this State to do—*interpret the law*.

And yet the defendant has continued to question *our right to interpret* the law. The spectre of lawlessness became more vivid each passing day, as one after another, statements of intent to *disregard the law* and to *disobey the order of the court*, emanated from parties-defendant to this suit; not simply citizens of this State, but our highest elected officials. Surely no disagreement, no matter how controversial or how costly, is worth the price defendants appeared willing to pay—abandonment of the rule of law. The dictionary defines "anarchy" as a "lawless condition of society" and the "non-existence or incapability of governmental rule." Surely the word describes the condition this State would be in if the Executive Branch of Government willingly and knowingly refuses to obey the law and establishes itself as a superjudiciary to decide which laws it will obey, and which it will not.

The framers of our Constitution provided a system of checks and balances because they realized and appreciated the lesson of history that no man or group of men can be safetly entrusted with unlimited power. They established this Constitution to be changed only by the procedure of amendment in order that the fundamental principles of our Government should be secure against the dangers of temporary popular passion or the personal prejudices of public office holders.

What check is there on the actions of the Executive if it is not bound by the law as the law is determined by the courts pursuant to the duty prescribed for them by the Constitution?

What check is there on the acts of the General Assembly if redress by the courts of grievances growing out of those acts is unavailable, or, worse, ineffective?

The judicial branch of government is checked by the very nature of its creation and its existence. Courts properly have neither the power of the purse (the General Assembly does) nor the power of the sword (the Governor does).

Neither the purse nor the sword can protect the liberty of free citizens.

A learned and distinguished public servant once said:

"We have in this country but *one security*. You may thing that the *Constitution* is your security—it is nothing but a *piece of paper*. You may think that the *statutes* are your security—They are nothing but *words in a book*. You may think that *elaborate machinery of government* is your security—it is nothing but an organization of mortal men. All of these things are nothing without strong, sound and uncorrupted public opinion and respect for the law."

[5] We would point out that *no* privilege protects an elected public official from disciplining by the court for non-feasance, misfeasance or malfeasance in office.

We would further point out that the issues which have been raised—in some instances three, four and five times over—have been answered by this court, not ignored or overlooked. The defenses raised in behalf of the Auditor in the contempt proceeding were not new or novel—they were the same issues we have determined before. The Auditor asserts that she is bound by the Constitution and the laws of this State. We assert the law is before her. Her duty is

clear. There is no malice in our order. There is only the intent that the dictates of the people through their Constitution be observed, and that a government of law for the State of Indiana be preserved.

ORDER

[6, 7] Comes now the plaintiff-petitioner by attorneys Donald E. Bowen and Ronald S. Lieber, and comes also the defendant-respondent, Trudy Slaby Etherton, Auditor of the State of Indiana, in her own proper person, and by her attorneys, Theodore L. Sendak, Attorney General of the State of Indiana; Richard C. Johnson, Deputy Attorney General; John Carmody, Deputy Attorney General; Sheldon A. Breskow, Deputy Attorney General; Wendell C. Hamacher, Deputy Attorney General, and the court, having heretofore heard evidence on the issue joined by plaintiff-petitioner's affidavit alleging contempt and defendant-respondent's answer thereto, and the court having taken its finding under advisement, and now having considered the same and being duly and fully advised in the premises, finds that the allegations of plaintiff-petitioner's affidavit alleging contempt are true and that the defendant-respondent has failed to purge herself of contempt and is guilty of a contempt of this court in refusing to draw a warrant payable to the Clerk of this court, as heretofore ordered by this court on December 16, 1969.

The court further finds that by reason of defendant-respondent's contempt of this court she shall be committed to the custody of the Sheriff of Marion County, Indiana, and be held by him in the Marion County Jail until such time as she may purge herself by drawing said warrant on the Treasury of the State of Indiana, payable to the

Clerk of this court, in compliance with the order heretofore issued on December 16, 1969, or until further order of this court.

It is, therefore, ordered, adjudged and decreed by the court that the defendant-respondent herein, Trudy Slaby Etherton, Auditor of the State of Indiana, be, and she is hereby, found guilty of contempt of this court.

It is further ordered and decreed that the said Trudy Slaby Etherton be, and she is hereby, committed to the custody of the Sheriff of Marion County, Indiana, and be held by him in the Marion County Jail until such time as she may purge herself by drawing said warrant on the Treasury of the State of Indiana, payable to the Clerk of this court, as heretofore ordered on December 16, 1969, which order, omitting caption, reads as follows:

"ORDER"

"It appearing to this Court that pursuant to Order of the Court made and entered on November 19, 1969, James O. Mathis, as Commissioner of the Indiana Department of State Revenue and Richard A. Green, as Inheritance Tax Administrator of the State of Indiana, did on the 20th day of November, 1969, file with the Clerk of the Supreme and Appellate Courts duplicate certified computations of the amounts deposited by Marion County, Indiana, in the Indiana Inheritance Tax Account of the General Fund of the State Treasury for the calendar years 1967 and 1968.

"It further appearing that plaintiff, State of Indiana, on the relation of The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, did on December 2, 1969, file its Answer to Response to Order of

This Court—November 19, 1969, which Answer accepts as true the certified computation as hereinabove mentioned.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Clerk of the Supreme and Appellate Courts transmit *instanter* a copy of said certified computation to Trudy Slaby Etherton, Auditor of the State of Indiana.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Trudy Slaby Etherton, Auditor of the State of Indiana, on or before December 22, 1969, draw and issue a warrant upon the General Fund of the Treasury of the State of Indiana for a sum equal to ninety percent (90%) of the amount so computed and certified and that she immediately present and deposit said warrant with the Clerk of the Supreme and Appellate Courts.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that John K. Snyder, Treasurer of the State of Indiana, honor said warrant when called upon to so do.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Supreme and Appellate Courts shall, upon receipt of said warrant, disburse the same as follows:

"1. Said amount so deposited with the Clerk of the Supreme and Appellate Courts of Indiana shall be disbursed by said Clerk to The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, less the amount to be disbursed to the attorneys of record for The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, in satisfaction of an attorneys' lien filed by said attorneys for the plaintiff on February 28, 1969.

"2. The Clerk of the Supreme and Appellate Courts shall, upon receipt of the warrant representing ninety percent (90%) of State Inheritance Taxes remitted to the Indiana Department of State Revenue, Inheritance Tax Division, from Marion County, Indiana, which were deposited in the 'Inheritance Tax Account' of the State Treasury for the period January 1, 1967, through and including December 31, 1968, disburse ten percent (10%) of said funds so remitted for the period beginning January 1, 1967, to and including December 31, 1967, to the attorneys of record for The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, which ten percent (10%) disbursement is in satisfaction of an attorneys' lien, filed by the attorneys of record for the plaintiff herein on February 28, 1969.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this Order be served upon John K. Snyder, Treasurer of the State of Indiana; upon Trudy Slaby Etherton, Auditor of the State of Indiana; and upon Kendal E. Mathews, Clerk of the Supreme and Appellate Courts, by the bailiff of this court.

"ORDERED this 16 day of December, 1969, at Indianapolis, Indiana.

"/s/ John W. Pfaff

JOHN W. PFAFF
Chief Justice

WHITE, J., not participating"
or until further order of this court.

White, J., not participating.

IN THE

SUPREME COURT OF INDIANA

STATE OF INDIANA, on relation of) The Mass Transportation Authority of) Greater Indianapolis, a municipal corporation, *Plaintiff,*)

v.) No. 767A39

INDIANA REVENUE BOARD,) EDGAR D. WHITCOMB, as a Member) of the Indiana Revenue Board,) JOHN K. SNYDER, Treasurer of the) State of Indiana, and as a Member of) The Indiana Revenue Board,) TRUDY SLABY ETHERTON, Auditor) of the State of Indiana, and as a Member of the Indiana Revenue Board,) INDIANA DEPARTMENT OF STATE) REVENUE,) JAMES O. MATHIS, as Commissioner) of the Indiana Department of State) Revenue,) THE STATE BOARD OF TAX COMMISSIONERS,) JOSEPH D. GEESLIN, JR., CARLETON) L. PHILLIPPI, as Members of the) State Board of Tax Commissioners of) Indiana,) T. MICHAEL SMITH, as Inheritance Tax) Administrator,) *Defendants.*)

Filed Apr 10, 1970

ORDER

This action is before this court on a petition to transfer the Appellate Court contempt citation of February 26,

1970. The appellee filed its motion to dismiss the petition to transfer in words and figures to wit: (H.I.)

Now, therefore, Hunter, C.J., Arterburn and Jackson, JJ. believe that the petition to transfer should be dismissed. DeBruler, J. is of the opinion that the motion to dismiss be denied. Givan, J. did not participate in this case.

The motion to dismiss is, therefore, granted.

Dated this 10th day of April, 1970.

s/ Donald H. Hunter

DONALD H. HUNTER,
Chief Justice

DeBruler, J. dissenting;

Givan, J. not participating.

IN THE

SUPREME COURT OF INDIANA

STATE OF INDIANA, on relation of) The Mass Transportation Authority of) Greater Indianapolis, a municipal corporation,
Plaintiff,

v. No. 767A39

INDIANA REVENUE BOARD, EDGAR D. WHITCOMB, as a Member of the Indiana Revenue Board, JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of The Indiana Revenue Board, TRUDY SLABY ETHERTON, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE, JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue, THE STATE BOARD OF TAX COMMISSIONERS, JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPI, as Members of the State Board of Tax Commissioners of Indiana, T. MICHAEL SMITH, as Inheritance Tax Administrator,
Defendants.

Filed June 1, 1970

ORDER

This action is before this court on a petition to transfer the Appellate Court contempt citation of February 26,

1970. The Appellee filed its motion to dismiss the petition to transfer in words and figures to-wit: (H.I.)

The present pleading under the circumstances is sham surplusage and the doctrine of *res judicata* is applicable to all the matters belatedly sought to be presented by this repetitious petition for transfer.

Now, therefore, Hunter, C.J., Arterburn and Jackson, JJ. believe that the petition to transfer should be dismissed, and the motion to dismiss be granted. DeBruler, J. is of the opinion that transfer should be granted. Givan, J. did not participate in this case.

The motion to dismiss is, therefore, granted.

Dated this 1st day of June, 1970.

/s/ Donald H. Hunter

DONALD H. HUNTER,
Chief Justice

DeBruler, J. dissenting.

Givan, J. not participating.

IN THE

APPELLATE COURT OF INDIANA

STATE OF INDIANA, on relation of) The Mass Transportation Authority of) Greater Indianapolis, a municipal cor-) poration,
Plaintiff,

v. No. 767A39

INDIANA REVENUE BOARD,
EDGAR D. WHITCOMB, as a Member) of the Indiana Revenue Board,
JOHN K. SNYDER, Treasurer of the) State of Indiana, and as a Member of) The Indiana Revenue Board,
TRUDY SLABY ETHERTON, Auditor) of the State of Indiana, and as a Mem-) ber of the Indiana Revenue Board,
INDIANA DEPARTMENT OF STATE) REVENUE,
JAMES O. MATHIS, as Commissioner) of the Indiana Department of State) Revenue,
THE STATE BOARD OF TAX COM-) MISSIONERS,
JOSEPH D. GEESLIN, JR., CARLETON) L. PHILLIPPI, as Members of the) State Board of Tax Commissioners of) Indiana,
T. MICHAEL SMITH, as Inheritance Tax) Administrator,
Defendants.

Filed Mar 4, 1970

ORDER

Comes now, Respondent, Trudy Slaby Etherton, Auditor of the State of Indiana, by her attorney of record, and

shows this Court that she has conveyed to the Clerk of the Supreme and Appellate Courts a warrant in the sum of $12,737,228.96 in full satisfaction of the judgment as entered by this Court on December 31, 1968.

Respondent further informs this Court that she executed and delivered this warrant under protest in accordance with the Resolution of Instructions from the Indiana State Board of Finance, whose resolution to that effect is included herewith as affecting said Respondent:

(H.I.)

without waiving the legal and constitutional rights of Respondent.

AND THIS COURT, having examined the foregoing and being duly advised in the premises, now orders, adjudges, and decrees:

I. That Respondent, Trudy Slaby Etherton, Auditor of the State of Indiana, is hereby purged of the contempt charges adjudged by this Court on February 26, 1970.

II. That the Clerk of the Supreme and Appellate Courts shall distribute these funds in accordance with the order of this Court dated December 16, 1969.

III. Dated at Indianapolis, Indiana, this 4th day of March, 1970.

/s/ GEORGE B. HOFFMAN

George B. Hoffman, Jr.,
Acting Chief Justice
Appellate Court of Indiana

(Excerpt from the minutes of
the Indiana State Board of
Finance Meeting, March 4, 1970)

RESOLUTION

On motion duly made, seconded and unanimously carried, the following resolution was made this date by the State Board of Finance:

"It is hereby resolved that the Indiana State Board of Finance protest the payment of the monies claimed by the Mass Transportation Authority of Greater Indianapolis and its successor, Department of Transportation of the Consolidated City of Greater Indianapolis and their attorneys of record whose claim is bottomed on a contingency basis under a so-called lawyer's lien;

"And it is further resolved that the Indiana State Board of Finance instructs the Auditor of State and the Treasurer of State that when they draw and pay such warrants as ordered by the Appellate Court of Indiana in Cause No. 767 A 39 that said Auditor of State and Treasurer of State indicate the official protest of the Indiana State Board of Finance at the time of drawing, delivering and paying said warrant or warrants."

s Edgar D. Whitcomb

EDGAR D. WHITCOMB,
President, Indiana State
Board of Finance

IN THE

APPELLATE COURT OF INDIANA

STATE OF INDIANA, on relation of) The Mass Transportation Authority of) Greater Indianapolis, a municipal cor-) poration, *Plaintiff,*	)	
v.	)	No. 767A39
INDIANA REVENUE BOARD,) EDGAR D. WHITCOMB, as a Member) of the Indiana Revenue Board,) JOHN K. SNYDER, Treasurer of the) State of Indiana, and as a Member of) The Indiana Revenue Board,) TRUDY SLABY ETHERTON, Auditor) of the State of Indiana, and as a Mem-) ber of the Indiana Revenue Board,) INDIANA DEPARTMENT OF STATE) REVENUE,) JAMES O. MATHIS, as Commissioner) of the Indiana Department of State) Revenue,) THE STATE BOARD OF TAX COM-) MISSIONERS,) JOSEPH D. GEESLIN, JR., CARLETON) L. PHILLIPPI, as Members of the) State Board of Tax Commissioners of) Indiana,) T. MICHAEL SMITH, as Inheritance Tax) Administrator, *Defendants.*	)	

Filed Mar 5, 1970

ACKNOWLEDGE OF PAYMENT AND RELEASE

Come now Richard M. Givan and John F. Neff, attorneys of record in the above entitled matter for theplaintiff,

The Mass Transportation Authority of Greater Indianapolis, and do hereby acknowledge receipt of the disbursement of payment of their attorneys fee from Kendal E. Mathews, Clerk of the Supreme and Appellate Courts, pursuant to order of the Appellate Court of Indiana, dated October 21, 1969, and in consideration of said payment on behalf of themselves individually and on behalf of the law firms of Bowen, Myers & Northam, and Lieber & Neff do hereby release the attorneys lien filed in this cause on February 28, 1969.

Dated this 5th day of March, 1970.

/s/ RICHARD M. GIVAN,

RICHARD M. GIVAN,
Individually and on behalf of
the law firm of Bowen, Myers
& Northam

/s/ John F. Neff

JOHN F. NEFF,
Individually and on behalf of
the law firm of Lieber & Neff

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Before me, a Notary Public, in and for said County and State, personally appeared Richard M. Givan and John F. Neff and, acknowledge the execution of the foregoing acknowledge of payment and release.

Witness my hand and notarial seal this 5th day of March, 1970.

/s/ Saundra J. A. Robinson

SAUNDRA J. A. ROBISON
Notary Public

My Commission Expires: 11-7-72

IN THE

APPELLATE COURT OF INDIANA

STATE OF INDIANA, on relation of The Mass Transportation Authority of Greater Indianapolis, a municipal corporation,	*Plaintiff,*	
v.		No. 767A39
INDIANA REVENUE BOARD, EDGAR D. WHITCOMB, as a Member of the Indiana Revenue Board, JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of The Indiana Revenue Board, TRUDY SLABY ETHERTON, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE, JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue, THE STATE BOARD OF TAX COMMISSIONERS, JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPI, as Members of the State Board of Tax Commissioners of Indiana, T. MICHAEL SMITH, as Inheritance Tax Administrator,	*Defendants.*	

Filed Mar 5, 1970

RELEASE OF PLAINTIFF

Comes now Richard B. Wetzel, the duly appointed, qualified and acting Executive Director of the Department of

Transportation, City of Indianapolis, successor in interest to the Mass Transportation Authority of Greater Indianapolis, a municipal corporation, plaintiff in the above entitled cause, and for and on behalf of the Department of Transportation, City of Indianapolis, in consideration of the sum of $11,909,752.60 receipt of which is hereby acknowledged from Kendal E. Mathews, clerk of the Appellate Court of the State of Indiana does hereby release the said defendants named and each of them and the said Kendal E. Mathews from any and all other demands and claims in the above entitled cause.

/s/ Richard B. Wetzel
RICHARD B. WETZEL

ATTEST:

/s/ Marjorie H. O'Laughlin
MARJORIE H. O'LAUGHLIN
Clerk

LIEBER & NEFF
322 Circle Tower
Indianapolis, Indiana 46204
639-1326

IN THE

APPELLATE COURT OF INDIANA

STATE OF INDIANA, on relation of The Mass Transportation Authority of Greater Indianapolis, a municipal corporation,

Plaintiff,

v. No. 767A39

INDIANA REVENUE BOARD, EDGAR D. WHITCOMB, as a Member of the Indiana Revenue Board, JOHN K. SNYDER, Treasurer of the State of Indiana, and as a Member of The Indiana Revenue Board, TRUDY SLABY ETHERTON, Auditor of the State of Indiana, and as a Member of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE, JAMES O. MATHIS, as Commissioner of the Indiana Department of State Revenue, THE STATE BOARD OF TAX COMMISSIONERS, JOSEPH D. GEESLIN, JR., CARLETON L. PHILLIPPI, as Members of the State Board of Tax Commissioners of Indiana, T. MICHAEL SMITH, as Inheritance Tax Administrator,

Defendants.

Filed Mar 5, 1970

ORDER

Comes now Richard B. Wetzel, the duly appointed, qualified, and acting Executive Director of the Department

of Transportation, City of Indianapolis, successor in interested to the Mass Transportation Authority of Greater Indianapolis, a municipal copporation, plaintiff in the above-entitled cause, and files herein his Release of Plaintiff, in the following words and figures, to-wit:

(H. I.)

And come also Richard M. Givan and John F. Neff, attorneys of record for the plaintiff herein, and file their Acknowledge of Payment and Release, in the following words and figures, to-wit:

(H. I.)

And the Court, having examined said matters, and being duly advised, finds that the Clerk should spread them of record in this matter.

IT IS, THEREFORE, ORDERED AND DECREED that the Clerk of the Supreme and Appellate Courts be, and he is, hereby ordered to spread of record the above described Release of Plaintiff and Acknowledge of Payment and Release.

ORDERED this 5th day of March, 1970.

/s/ George B. Hoffman, Jr.

GEORGE B. HOFFMAN, JR.
Acting Chief Justice

WHITE, J., Not participating

UPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 25 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. 610

INDIANA REVENUE BOARD, ET AL.,

Petitioners,

v.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a Municipal Corporation, and Richard M. Givan and John F. Neff,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPENDICES

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Central Publishing Company, Inc., Indianapolis, Ind.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. ——

INDIANA REVENUE BOARD, ET AL.,

Petitioners,

v.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a Municipal Corporation, and Richard M. Givan and John F. Neff,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPENDICES

OPINIONS BELOW

The Petition for Writ of Certiorari is directed to the Judgment and Order of Commitment of the Appellate Court of Indiana, acting as a trial court, entered on February 26, 1970, as reported in —— Indiana Appellate ——, 255 N.E. 2d 822, ordering Trudy Slaby Etherton, the Auditor of the State of Indiana, committed to the Marion

County (Indiana) Jail for contempt of Court; the dismissal of the Petition to Transfer the aforesaid judgment and order to the Indiana Supreme Court entered on April 10, 1970, without opinion; and the dismissal of Petition for Rehearing to the Indiana Supreme Court entered June 1, 1970, without opinion.

JURISDICTION

The Petitioner is invoking the jurisdiction of this Court under 28 U.S.C. Sec. 1257 (3). As set forth in Rule 19 of the Supreme Court of the United States, "A review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore."

The decision of the Appellate Court of Indiana was based upon non-Federal grounds which were adequate to support the Court's judgment.

The Petitioners have waived any claim under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, since it was not seasonably raised.

QUESTIONS PRESENTED

1. Were the Federal Questions Presented by the Petitioners Properly or Seasonably raised for the Purpose of a Writ of Certiorari?

2. Was Petitioner Etherton in any way excused from abiding by the Mandate of the Indiana Appellate Court?

3. Were all of the questions of law properly decided by the Indiana Supreme Court and Indiana Appellate Court, and were these either exclusively state questions or non-substantial federal questions?

4. Were the Petitioners the proper parties to raise the question of payment of attorney's fees?

STATUTES & CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Constitutional Provisions set out in the Petition on pages 3 and 4 in addition to the Statutes set out in the Petition on pages 4 and 5 and in the Petitioners' Appendix, pages 70 to 77 the Respondents submit at Appendix A the following statutes and rules:

Acts of 1967, ch. 311, § 3 as amended, as found in Burns' Indiana Statutes Annotated (1970 Supp.) Section 36-3433 (a) (1).

Acts of 1965 (Spec. Sess.), ch. 59 § 1 as amended as found in Burns' Indiana Statutes Annotated (1968 Repl.) Section 4-7416.

Acts of 1925, ch. 79 § 1 as found in Burns' Indiana Statutes Annotated (1961 Repl.), Sec. 61-101.

Acts of 1925, ch. 79 § 2 as found in Burns' Indiana Statutes Annotated (1961 Repl.), Section 61-102.

Acts of 1925, ch. 28 § 1 as found in Burns' Indiana Statutes Annotated (1961 Repl.), Section 61-202, Seventh.

Acts of 1931, ch. 75 § 14 as Amended, as found in Burns' Indiana Statutes Annotated (1970 Supp.), Section 7-2414.

STATEMENT OF THE CASE

On December 31, 1968, the Indiana Appellate Court adjudged that the Governor had no power to pocket veto

a statute containing an emergency clause providing for its immediate taking effect, and it held that a 1967 Act giving certain inheritance tax funds to the counties had, therefore, become the law.

A newly elected State Auditor had taken office, and several other State officials took office in January, 1969. Under the judgment the new Auditor was mandated to pay the counties the inheritance tax money due them. A month and a half later, the Indiana General Assembly attempted to repeal the 1967 Act retroactively to the day of its enactment. Based upon the repeal, the Auditor refused to obey the mandate. On petition of the Respondent, the Indiana Appellate Court held that the Legislature could not repeal a final judgment, and it ordered payment to be made. When the Auditor still refused to make payment, she was found guilty of contempt and ordered to jail. The Petitioners petitioned the Indiana Supreme Court to accept transfer of the contempt order. The Petition to Transfer and subsequent Petition for Rehearing were dismissed by a three to one vote (one abstention).

Certain errors in the Petitioners' Statement of the case (Petition, page 5 to 11) should be pointed out.

1. The Respondents would object to this Petition and Response being consolidated and considered with Petition for Writ of Certiorari No. 1680 filed June 11, 1970, for the reason that consolidation would enable the Petitioners to bring up questions in this proceeding which were not properly or timely raised and which would cloud the question of contempt of court by the Petitioner, Trudy Slaby Etherton.

2. On Page 6 of the Petition it is stated that a special account was created to hold Inheritance Taxes and im-

plied that it was separate and apart from the General Fund. That account already existed (see Appendix page A-1, Acts of 1931, ch. 75, § 14, as found in Burns' Ind. Stat. Anno. (1970 Supp.), Section 7-2414) and it was a part of the General Fund. (Appendix, pages A-1 to A-2 Acts of 1925, ch. 28 § 1, as found in Burns' Ind. Stat. Anno. (1961 Repl.), Section 61-202, Seventh.)

3. The paragraph beginning on page 6 and ending on page 7 of the Petition attempts to place in question a judgment rendered by the Indiana Appellate Court on December 31, 1968, which has long since been affirmed by the Indiana Supreme Court. It serves merely as an attempt to cloud the main question regarding whether Trudy Slaby Etherton was properly found in contempt of Court. It is not timely and should be stricken from the Petition or given no consideration.

4. The second paragraph of page 7 of the Petition states that the Appellate Court Opinion of December 31, 1968, *State ex rel. Mass. Transp. Auth. v. Indiana Rel. Bd.* (1968), — Ind. App. —, 242 N.E. 2d 642, reversed the case of *State ex rel Owens v. 40th Judicial District* (1931), 202 Ind. 354, 174 N.E. 423, dealing with the veto power of the Governor of Indiana. This is incorrect. That opinion merely limits the Governor to the veto power given him under the Indiana Constitution. *State ex rel. Owens v. 40th Judicial District* (1931), 202 Ind. 354, 174 N.E. 423, simply said, if an act which contains neither an emergency clause nor an effective date is not promulgated pursuant to statute, it has not become law. It did not extend the Governor's veto power.

5. The third and fourth paragraphs of page 9 of the Petition say that on October 21, 1969, the Appellate Court

entered its first mandate. This is incorrect. The only mandate ever entered in this case was the Judgment of December 31, 1968. On October 21, 1969, after giving the Petitioners ten months to voluntarily comply with the mandate, the Appellate Court entered an order giving the Petitioners a date certain by which to comply or be found in contempt of Court. The Court amended this order due to incorrect terminology, and then on two subsequent occasions gave the Petitioners additional time in which to comply. On each occasion the Petitioners failed and refused to comply with these orders.

6. The third and fourth paragraphs on page 10 of the Petition should be stricken or refused consideration, since the propriety of any action under Rule 70A of the Indiana Rules of Civil Procedure has never before been raised by the Petitioners. The only purpose for its insertion is to cloud the main issue.

ARGUMENT

REASONS FOR DENYING THE WRIT

NONE OF THE FEDERAL QUESTIONS PRESENTED BY THE PETITIONERS WERE PROPERLY OR SEASONABLY RAISED FOR THE PURPOSE OF A WRIT OF CERTORARI

A. The Petitioners have pointed out that Petitioner Etherton took office on December 1, 1968, and that various others among the Petitioners took office in January, 1969.

The question of substitution was first raised by the Petitioners on November 20, 1969, almost a year after the substituted Petitioners took office, during which time at least sixteen pleadings of various sorts had been filed by the attorney for the Petitioners, including:

1. Appellants' Petition to Transfer dated January 10, 1969.
2. Appellants' Petition for Rehearing dated January 13, 1969.
3. Appellants' Petition for Oral Argument dated January 13, 1969.
4. Appellants' Petition for Oral Argument dated January 14, 1969.
5. Appellants' Petition for Instructions dated January 14, 1969.
6. Appellants' Motion to Dismiss Petition for Order for Payment of Funds Pursuant to Judgment dated April 11, 1969.
7. Appellants' Brief in Opposition to Order for Pay-

ment of Funds Pursuant to Judgment dated September 12, 1969.

8. Appellants' Petition for Enlargement of Time dated October 29, 1969.

9. Appellants' Motion to Vacate Order dated October 29, 1969.

10. Appellants' Request for Oral Argument and Early Ruling dated November 4, 1969.

11. Appellants' Petition to Vacate Order dated November 7, 1969.

12. Appellants' Petition for Rehearing dated November 10, 1969.

13. Appellants' Petition for Stay of Execution dated November 10, 1969.

14. Appellants' Petition for Transfer dated November 10, 1969.

15. Appellants' Petition for Stay of Execution dated November 14, 1969.

16. Appellants' Motion for Disqualification dated November 18, 1969.

The substituted petitioners' names were first placed in the caption of this case on October 21, 1969. The Petitioners thereafter filed nine pleadings in the Indiana Appellate Court and the Indiana Supreme Court before raising the question of the propriety of the substitution.

However, even when the question of substitution was first raised, the argument of denial of due process was not raised by the Petitioners.

The Indiana Appellate Court in its opinion in *State ex rel. Mass. Transp. Auth. v. Ind. Revenue Bd.* (1969) —

Ind., App. —, 253 N.E. 2d 725, at pages 728-730 found, among other reasons, that by appearing voluntarily the Petitioners had waived any objections to improper substitution.

The Petitioners then filed a Petition to Transfer this case to the Indiana Supreme Court on January 5, 1970, and still did not raise the question of denial of due process. It was only when the Petitioners filed a Petition for Rehearing, after refusal by the Indiana Supreme Court to grant transfer, that the due process question was finally raised. That was on February 24, 1970.

First and foremost, the Appellate Court correctly ruled that the substitution of the Petitioners was proper. Second, under no circumstances can it be said that the Federal Question of denial of due process was raised at the trial level in this case, and thus under Indiana law, it was not seasonably raised.

B. Trial Rule 19 F(3) of the Indiana Rules of Civil Procedure was not in effect when the substitution of the Petitioners took place. It should not be considered germaine to the issue of substitution. Nor is the United States Supreme Court the place to initiate the question of its Constitutionality, that question having never yet been raised in any state court in Indiana.

C. On February 26, 1970, the Indiana Appellate Court made an order which is set out in Petitioner's Appendix pages A-1 to A-12. *State ex rel. Miss. Transp. Auth. v. Indiana Revenue Board* (1970), — Ind. App. —, 255 N.E. 2d 833.

The Order provided in part that:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Trudy Slaby Etherton,

Auditor of the State of Indiana, on or before December 22, 1969, draw and issue a warrant upon the General Fund of the Treasury of the State of Indiana for a sum equal to ninety percent (90%) of the amount so computed and certified and that she immediately present and deposit said warrant with the Clerk of the Supreme and Appellate Courts.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Supreme and Appellate Courts shall, upon receipt of said warrant, disburse the same as follows:

1. Said amount so deposited with the Clerk of the Supreme and Appellate Courts of Indiana shall be disbursed by said Clerk to The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, less the amount to be disbursed to the attorneys of record for The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, in satisfaction of an attorneys' lien by said attorneys for the plaintiff on February 28, 1969.

2. The Clerk of the Supreme and Appellate Courts shall, upon receipt of the wararnt representing ninety percent (90%) of the State Inheritance Taxes remitted to the Indiana Department of State Revenue, Inheritance Tax Division, from Marion County, Indiana, which were deposited in the 'Inheritance Tax Account' of the State Treasury for the period January 1, 1967, through and including December 31, 1968, disburse ten percent (10%) of said funds so remitted for the period beginning January 1, 1967, to and including December 31, 1967, to the attorneys of record for The Mass Transportation Authority of Greater Indianapolis, a municipal corporation, which ten percent (10%) disbursement is in satisfaction of an attorneys' lien, filed by the attorneys of record for the plaintiff herein on February 28, 1969.

The Order to the Clerk of the Supreme and Appellate Courts ordering him to pay attorney fees was pursuant to

a Notice of Intent to Hold Attorneys' Lien filed by Richard M. Givan and John F. Neff on February 28, 1969.

Attached to the Notice of Intent to Hold Attorneys' Lien was a copy of the contract entered into between the Mass Transportation Authority and John F. Neff and Richard M. Givan, the attorneys, providing that the attorneys receive a contingent fee of ten per cent (10%) of the amount received by the Mass Transportation Authority during the first year the law is in effect.

The same order was first entered by this Court on October 21, 1969, but vacated. It was entered again on November 6, 1969. It contained the same words regarding payment of attorney fees as did the order of February 26, 1970.

On November 10, 1969, the Petitioners filed a petition to transfer the order of November 6, 1969, to the Indiana Supreme Court. This petition was denied on November 17, 1969, by a vote of 3 to 1, with one abstention. Nowhere in the petition to transfer was the question of attorney's fees raised.

The Appellate Court renewed this order on December 16, 1969, after numerous delays. The portion regarding payment of attorney fees again was in exactly the same terms as in all the other orders. Again, on January 5, 1970, when the Petitioners filed a Petition to Transfer the opinion and order of December 16, 1969, to the Indiana Supreme Court, the question of attorneys fees was not raised.

On February 24, 1970, when the Petitioners filed a Petition for Rehearing of the Supreme Court's denial of the petition to transfer the Appellate Court's order of December 16, 1969, the attorney fee question was first raised. This was fully a year after the attorney's lien had been filed, and one appeal too late.

Unfortunately, the above narrative was characteristic of the method by which the Petitioners operated throughout this case. Whenever they thought up a new argument to an old question, they would file a new petition to transfer, or a petition for rehearing, even though the old argument had long since been decided, and time for appeal had long since passed. Appeals in Indiana cannot be handled on a piece-meal basis. Any objections not originally and timely made are waived and cannot be brought up for the first time on appeal.

Drinkwater v. Eikenberry (1946), 224 Ind. 84, 64 N.E. 2d 399;

Azimow v. Stoker (1960), 131 Ind. App. 195, 166 N.E. 2d 887;

Barton v. State (1960), 240 Ind. 257, 163 N.E. 2d 600, 601.

The rule in Indiana is that a question must be raised at the trial level in order to be preserved on appeal.

J. I. Case Co. v. Sandefur (1964), 245 Ind. 213, 197 N.E. 2d 519.

1 *Indiana Law Encyclopedia, Appeals*, § 71, p. 577.

Constitutional questions are no exception to the general rule and cannot ordinarily be raised for the first time on appeal.

Voelkel v. Berry (1966), 139 Ind. App. 267, 218 N.E. 2d 924.

1 *Indiana Law Encyclopedia, Appeals*, § 73, p. 579.

The United States Supreme Court will not consider questions not seasonably raised in accordance with State Law.

Edelman v. People of State of California, Cal. 1953, 344 U.S. 357, 78 S.Ct. 293, 295, 97 L.Ed. 387.

PETITIONER ETHERTON WAS NOT IN ANY WAY EXCUSED FROM OBEYING THE MANDATE OF THE INDIANA APPELLATE COURT

The Petitioner, Etherton, claims that she was excused from obeying the Mandate of the Appellate Court, and that in coercing her to pay the Respondent by means of contempt of court proceedings, the Court denied her due process of law by being unfair and abusive toward her and forcing her to violate her oath of office.

She maintains that she was excused for the following reasons:

1. She was not properly substituted as a party.

2. The Mass Transportation Authority had ceased to exist and the Legislature had not specifically given the proceeds of this suit to any agency.

3. The granting of attorneys fees made the entire order of the Appellate Court void.

4. The repeal of the law under which the Auditor's duty arose justified her refusal to further obey the mandate.

5. The Auditor had sworn to uphold the Constitution, and in her opinion the Court's mandate was unconstitutional, so she had a right to ignore it.

All of these reasons are patently invalid, and some of them downright frightening.

THE AUDITOR WAS PROPERLY SUBSTITUTED AS A PARTY

Aside from the fact that this question was not seasonably raised by the Petitioners, substitution was properly made for several reasons. The petitioners had entered general appearances by filing numerous pleadings. The Petitioners were State officials and took their office *lis pendens*, and were bound to know of the suits pending against their predecessor. They stepped into the shoes of the former office holder with all of the notice he had.

This was discussed at length in *State ex rel. Mass. Transp. Auth. v. Indiana Revenue Bd.* (1969), — Ind. App. —, 253 N.E. 2d 725 at pages 728 to 730, transfer denied.

The ruling by the highest court of a state that a substitution of defendants was properly made under state law and practices is conclusive and binding on the United States Supreme Court.

> *Boston v. Jackson*, Mass. 1922, 260 U.S. 309, 43 S.Ct. 129, 67 L.Ed. 274.

THE DEPARTMENT OF TRANSPORTATION OF THE CITY OF INDIANAPOLIS HAD INHERITED THIS SUIT AND THE PROCEEDS THEREFROM.

Under Acts of 1969, Ch. 173, § 314 as found in Burns' Indiana Statutes Annotated (1970 Supp.), Section 48-9213,

(Respondent's 1st Appendix, pages — to —), and Acts of 1969 Ch. 173 § 100, as found in Burns' Indiana Statutes Annotated (1970 Supp.) Section 48-9353, (Respondent's 1st Appendix pages — to —) as of January 1, 1970, all of the powers, obligations and duties of the Mass Transportation authority including all pending rights and liabilities relating to that Board were transferred to the Department of Transportation of the City of Indianapolis, and the Mass Transportation Authority ceased to exist.

One of the powers of the Mass Transportation Authority was the right to bring suit in its corporate name as a Municipal Corporation. Acts of 1967, ch. 311, § 3 as amended, as found in Burns' Indiana Statutes Annotated (1970 Supp.), Section 36-3433 (a) (1), (Respondent's Appendix page A-2).

The Legislature could not have been more specific. It is not incumbent upon the Legislature to set out each specific lawsuit in order that the right to pursue the lawsuit be transferred to the new agency.

THE GRANTING OF ATTORNEYS' FEES HAD NO EFFECT UPON THE ORDER

Again, while the question of payment of attorney fees was not seasonably raised by the Petitioners, the Respondents feel compelled to point out the erroneousness of the Petitioners' argument.

The rule in the case of *DONECH V. DONECH* (1938), 214 Ind. 559 pp. 562 to 564, 16 N.E. 2d 877, 879 to 880 cited by Petitioners was that in a divorce case an order of the court requiring the husband to pay his wife's attorney fees directly to the wife's attorney was void,

and a contempt citation cannot lie from refusal to obey such an order.

This case was specifically overruled by a 1939 Amendment to Acts of 1873, ch. 43, § 17 as found in Burns Ind. Stat. Annotated (1968 Repl.), Section 3-1216, and is no longer the law.

The *Bouch* rule is not applicable anyway because these were supplementary proceedings in which the Court normally orders the Defendant to make payment to the Clerk of the Court, who then distributes the proceeds of the judgment.

The Petitioners also cited the case of *Sears Roebuck & Co. v. State* (1968), 248 Ind. 169, 225 N.E. 2d 175. There the Indiana Supreme Court enunciated the rule that in order to award attorneys fees there must be some evidence in the record on the subject of the amount, adequacy and reasonableness of the attorney fees. Lack of such evidence is fatal.

Our case is completely distinguishable from *Sears Roebuck & Co. v. State*, supra. Here an attorney's lien was filed containing in it the contract between the Respondents and their attorneys which provided for fees.

Certainly, this was adequate evidence upon which to base an attorney fee.

In addition, if the client knows of the attorney's lien as entered on the judgment (the Respondent was served a copy at the time of filing) and assents to the amount of the fee claimed by the attorney after the services are

rendered, this is sufficient to fix the amount, and the client is bound thereby, and the clerk is under a duty to pay it to the attorney.

Putman v. Tennyson (1875), 50 Ind. 456;

State v. Blecke (1917), 71 Ind. App. 23, 116 N.E. 2.

The Respondent has never raised the question of the attorneys fee though a year has passed. This surely must be considered assent. If the Respondent cannot now raise the question, the Petitioners should not be able to raise it.

THE REPEAL OF THE LAW UNDER WHICH THE AUDITOR'S DUTY AROSE DID NOT JUSTIFY HER REFUSAL TO FURTHER OBEY THE MANDATE

The Petitioners' argument on pages 21 and 22 of their petition is based upon the premise that "Where defendants are ordered to perform certain duties enjoined by a specific statute and thereafter the statute is repealed, the proceedings will terminate."

In other words, let the Mass Transportation Authority have its judgment. The Legislature can repeal the statute and thereby erect a mysterious, invisible wall between the judgment and its enforcement, and this wall will protect the Auditor from the effects of the mandate.

The Petitioners then cited four cases to enforce their argument: *State v. Crawford*, 105 So. 446, 90 Fla. 264; *Cuteomp v. Ull; Mayor, etc.* 60 Iowa 156, 14 N.W. 214; *Mooney v. Drainage District No. 1 of Richardson County*, 113 Neb. 197, 274 N.W. 467; *Tubbs v. Linn*, 70 N.W. 273.

Three of these cases have no application here, all for the same reason: no final judgment had been rendered before the repeal of the legislation under which the mandamus actions were pending.

The case of *State v. Crawford*, 90 Fla. 264, 105 So. 446, dealt with an alternate writ of mandamus which is not a final judgment. The court specifically noted that as long as the legislature repealed a statute establishing a duty and the repealer came before the peremptory writ (final judgment), an alternate writ could be dismissed.

The same was true in the case of *Cutcomp v. Utt, Mayor, etc.*, 60 Iowa 156, 14 N.W. 214. In that case the mandamus petition was not filed until the day before the amendatory ordinance went into affect, and there was no final judgment. It, too, could be dismissed.

Also, in *Tubbs v. Linn*, 70 N.W. 2d 372, the Commissioner's discretion to issue permits had been withdrawn by statute before the mandamus was issued, so no final judgment ever accrued.

The Petitioners cite the case of *Mooney v. Drainage District No. 1 of Richardson County*, 113 Neb. 197, 274 N.W. 467, however; they apparently overlooked the fact that it was reheard in 134 Neb. 192, 278 N.W 368 and the opinion and judgment cited by Petitioners was vacated. In rehearing at 278 N.W. at page 371 the Nebraska Supreme Court stated:

> "The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of powers and functions of the three departments of government, it cannot be exercised by the legislature. While a statute may indeed declare what judgments shall in future be subject to be vacated, or when or how or for what causes, it

> cannot apply retrospectively to a judgment already rendered and which had become final and unalterable by the court before its passage. * * * It would be an unwarranted invasion of the province of the judicial department."

A Petition for certiorari was denied in this case by the United States Supreme Court. 305 U.S. 622 59 S.Ct. 84, 89 L.Ed. 84.

This case, cited by the Petitioners, is precisely to the same effect as the opinion of the Indiana Appellate Court in *State ex rel. Mass. Transp. Auth. v. Ind. Rev. Bd.* (1969), — Ind. App. —, 253 N.E. 2d 725, where it held that in the absence of a final judgment the Legislature could properly repeal a public right retroactively, but that the legislature would be violating the doctrine of separation of powers by retroactively repealing a final judgment of a court. It then held that the right to enforce the judgment is a part and parcel of the judgment and that the Legislature could not, by retroactive repealer, wipe out the fruits of the judgment anymore than it could wipe out the judgment itself. The court at 253 N.E. 2nd 730, note 6 said:

> "It is settled by authority, that after a final decree upon a trial of the merits of the case, by which the rights of the parties are settled, such further orders or decrees as may be necessary will be made to carry into effect the very rights decided upon the trial of the merits of the case, and that court will hear and determine and establish by order or decree anything necessary, that may be auxiliary to, or in execution of, the final decree on the merits."

Thus, when the Indiana Appellate Court in its decision of December 31, 1968, (State ex rel. Mass. Transp. Auth. v. Indiana Rev. Bd. (1968), — Ind. App. —, 242 N.E. 2d 642)

found that House Enrolled Act No. 1818 of the 1967 Indiana General Assembly was the law, it became the law for all purposes, and any inheritance tax funds due the counties in Indiana up to that time could not thereafter be taken away from them by any subsequent repealing legislation. The Auditor could not be excused from complying by any subsequent action by the Legislature. Since the judgment was in the form of a mandate to the Petitioners, the proper remedy in execution of the mandate was an order to the proper officer to comply, and then contempt proceedings if the officer refused. This is exactly what the court did.

THE STATE AUDITOR MAY NOT PLACE HER OWN INTERPRETATION OF THE INDIANA AND UNITED STATES CONSTITUTION ABOVE THAT OF A COURT

The Auditor was under a duty to support the Constitutions of Indiana and the United States. This means she must obey these Constitutions, not as she interprets them, but according to judicial interpretation.

> 42 *Am. Jur., Public Administrative Law*, § 68, p. 380, Note 17:
>
> *State ex rel. Atlantic Coast Line R. Co. v. Board of Equalizers*, 84 Fla. 592, 94 So. 681, 20 ALR 362.

The Indiana Appellate Court and Indiana Supreme Court have each consistently said that the Auditor would not be violating her oath of office by complying with the mandate of the Appellate Court.

The Indiana Appellate Court in its opinion in State ex rel. Mass. Transp. Authority v. Indiana Revenue Bd. (1969) — Ind. App. —, 253 N.E. 2d 725, at pages 733 to 736 gave a lengthy explanation of why there was an appropriation; that the appropriation was made by the Legislature, that the inheritance tax account was part of the General Fund. (See Respondent's Appendix page A-2 to A-4.)

The Auditor cannot, even by affidavit, place her judicial interpretations over those of the Appellate Court, in an attempt to justify refusal to comply with a court order.

Article 7, Section 1 of the Constitution of Indiana states "The judicial power of the State shall be vested in a Supreme Court, in Circuit Courts and such other Courts as the General Assembly may establish."

The power to interpret the Constitution and statutes is a judicial power. The Courts are the guardians of the Constitution.

Marbury v. Madison (1803), 1 Cranch 137, 2 L.Ed. 60.

The Appellate Court in its opinion of December 16, 1969, State ex rel. Mass. Transp. Auth. v. Ind. Rev. Bd. (1969), — Ind. App. —, 253 N.E. 2d 725) determined that House Enrolled Act No. 1818 was the law in the State of Indiana up to December 31, 1968, despite the legislative attempt to repeal it retroactively, and that the Act itself constituted an appropriation out of the General Fund. If the Auditor was dissatisfied with this opinion, her recourse was to the Indiana Supreme Court, and then to the United States Supreme Court, if a Federal Question existed.

Instead, the Auditor, out of hand, decided that the Appellate Court's opinion was wrong, and that her oath of office gave her the right to refuse to comply with it.

A more complete misunderstanding of Separation of Power would be hard to imagine.

Thereafter the Auditor was found in contempt of the Appellate Court. If the Court had done otherwise, orderly state government in Indiana would have ceased.

THE PETITIONERS WERE NOT THE PROPER PARTIES TO RAISE THE QUESTION OF ATTORNEY FEES.

The Clerk of the Supreme and Appellate Court, who was actually ordered to pay the attorney fees, the Department of Transportation, or a tax payer in a tax payers suit were the only ones who could have objected to the fees.

The Petitioners were not ordered to pay the attorney fee and were in no way responsible for it.

In order to be granted certiorari by the United States Supreme Court the Petitioners must show that the enforcement of the judgment would deprive them, not others, of a right arising under the Federal Constitution or laws.

Liberty Warehouse Co. v. Burky T.S. Coop. M. Assn., Ky. 1923, 276 U.S. 71, 48 S.Ct. 291, 72 L.Ed. 473; *Smith v. Indiana*, Ind. 1903, 191 U.S. 138, 24 S.Ct. 51, 48 L.Ed. 125; *Marshall v. Dye*, Ind. 1913, 231 U.S. 250, 34 S.Ct. 92, 58 L.Ed. 206.

THE NON FEDERAL GROUNDS UPON WHICH THIS CASE IS BASED ARE ADEQUATE AND THE FEDERAL GROUNDS UPON WHICH THIS CASE IS BASED ARE NOT SUBSTANTIAL ENOUGH FOR THE U.S. SUPREME COURT TO REVIEW THEM

The overriding question in this case is, whether a state official, in a state, whose constitution contains a separation of powers clause, may excuse himself from complying with a mandate of a court with which he disagrees.

The other question which arises regards substitution of parties.

These are purely state questions.

The Petitioners have not even set out how the payment of attorneys fees gives rise to a Federal question.

Respondent has attempted to show in this Brief that each of the questions presented was answered correctly by the Appellate and Supreme Court, and that several long and thoughtful opinions were written covering each question.

It must be noted that the party who was found in contempt of Court was both a high state official and a woman, and that the Appellate Court gave her every opportunity to be heard and purge herself of contempt before it was forced to take such drastic action. When it found her guilty of contempt of court the reasons were iron-clad.

Finally, the Petitioners claim that they were unable to obtain review because of the consistent two-two split (one abstention) of the Judges of the Indiana Supreme Court in denying earlier transfers and rehearings.

But this Petition for Writ of Certiorari is solely from contempt proceedings of February 25, 1970. Transfer and

rehearing were dismissed by the Indiana Supreme Court by identical three to one votes (one abstention). The claim that a three to one vote was an inability to obtain review and was therefore a denial of due process is certainly insubstantial.

CONCLUSION

Broadly stated, the Respondent feels the principle of law involved in this case is that under the Indiana Constitution, the three branches of government are co-equal and their powers are exclusive. Within this doctrine is the rule that the Legislature cannot eradicate a final judgment of a court nor can an auditor place her interpretation of the constitution and statutes above those of the court and use her interpretation as an excuse for refusing to obey the court's mandate.

More particularly, and as it relates to the Petition, questions of law, including constitutional questions must be timely raised or they are waived. They cannot be first raised on appeal or on petition for rehearing.

The Petitioners were properly substituted, and then were given every opportunity to have their case heard and reviewed. When the Auditor still refused to abide by the court orders, the court had no choice but to find her in contempt. The Petitioners were given more than their day in Court.

Any Federal questions which have been raised are either non-existent or totally insubstantial.

Respectfully submitted,

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APPENDIX

A.

Each county treasurer shall make a report, under oath, to the state board of tax commissioners on the first day of January, April, July and October, of each year, of all taxes received by him in the three (3) months next preceding under this act (§§ 7-2401-7-2411, 7-2412a-7-2442), in resident decedents' estates, and credited to the state of Indiana, stating for what estate and by whom and when paid. The form of such report sha[illegible] be prescribed by the state board of accounts. At the same time the county auditor shall issue his warrant payable to the treasurer of state for such inheritance taxes, interest and penalties as are due the state of Indiana complying with the provisions of section 7 (§ 7-2407) of this act, which warrant shall be stamped and countersigned by the county treasurer as required by law and transmitted to the state board of tax commissioners with his said report. The secretary of the board shall receipt and account for all warrants collected under the provisions of this act and shall deposit the same when received with the state treasurer in a special account to be created and known as the Inheritance Tax Account. Quietus shall be issued by the auditor of state to the state board of tax commissioners at the close of each month upon terms and conditions established for similar boards or commissions. It shall be the duty of the state board of tax commissioners to audit the reports provided for by this section. Shortages, as disclosed by said audit, shall be reported to and promptly covered by county treasurers and auditors concerned by issuance of warrants for the balance due. Excess payments as disclosed by the audit

of reports shall be refunded by the board in the manner set out in section 17 (§ 7-2417) of this act and not paid into the state board of tax commissioners. For all such taxes collected by a county treasurer and not paid into the state board of tax commissioners within thirty (30) days from the time herein required, he shall pay interest at the rate of ten (10) per centum per annum, for which he shall be personally liable.

Acts of 1931, ch. 75, Sec. 14, as Amended, being Burns' Section 7-2414.

B.

Powers of Authority.—(a) Subject to the limitations expressly set forth in this act (§§ 36-3431-36-3455), the Authority is authorized and empowered to:

(1) Sue and be sued in any court of competent jurisdiction in its corporate name as a municipal corporation. Service of process shall be made by leaving a copy of the document to be served at the principal office of the Authority with the person in charge thereof or with the executive director.

Acts of 1967, Ch. 311, § 3, Burns' 36-3433.

C.

State Funds defined.—Any and all revenue hereafter accruing to the state treasury by virtue of any tax levy or tax levies, fixed by law or by the state board of tax commissioners, as hereinafter provided, shall be kept in the following funds:

(a) The general fund;

(b) The state common school revenue fund;

(c) The Indiana World War Memorial fund;

(d) The Indiana state teachers' retirement fund;

(e) The Indiana state board of agriculture fund; and

(f) The Dunes Park fund.

Acts of 1925, ch. 79, Sec. 1, being Burns' Section 61-101.

D.

From and after the first day of October, 1925, in addition to the revenue which accrues to and is a part of the general fund of the state, as now provided by law, the general fund of the state shall consist of

* * * * *

Seventh. All inheritance taxes collection under and pursuant to law.

Acts of 1925, Ch. 28, Sec. 1, being Burns' Section 61-202.

E.

All revenue accruing to the state treasury by virtue of the tax levy as fixed by chapter 201 of the Acts of the general assembly of 1921, shall be paid into and shall constitute the state common school revenue fund, and shall be apportioned as now provided by law. All revenue accruing to the state treasury by virtue of the tax levy as fixed by section fifteen of chapter 50 of the Acts of the special session of the general assembly of 1920, shall be paid into and shall constitute the Indiana World War Memorial fund, and shall be expended as provided by law. All revenue accruing to the state treasury by virtue of the tax levy as fixed by section three of chapter 6 of the Acts of the general assembly of 1923, shall be paid into and shall con-

stitute the Indiana state board of agriculture fund and shall be expended as now provided by law. All revenue accruing to the state treasury by virtue of the tax levy as fixed by section one (§ 60-808) of chapter 94 of the Acts of the general assembly of 1923, shall be paid into and shall constitute the Dune Park fund, and shall be expended as now provided by law. All revenue accruing to the state treasury by virtue of a tax levy to be fixed by the state board of tax commissioners under and by virtue of the provisions of section four (§ 28-4506) of chapter 256 of the Acts of the general assembly of 1921, shall be paid into and shall constitute the Indiana State teachers' retirement fund, and shall be expended as provided by law. *All other revenue accruing to the state treasury by virtue of any levy as fixed by law or by the state board of tax commissioners, shall be paid into and shall constitute the general fund.* (Our emphasis.)

Acts of 1925, Ch. 79, Sec. 2 being Burn's Section 61-102.

F.

Lien of Attorney.—Any attorney practicing his profession in any court of record in this state, shall be entitled to hold a lien, for his fees, on any judgment rendered in favor of any person or persons employing such attorney to obtain the same; Provided, that such attorney, within sixty (60) days from the time such judgment shall have been rendered, enter in writing upon the docket or record wherein the judgment is recorded, his intention to hold a lien thereon, together with the amount of his claim, and if an appeal is taken on such judgment, such lien may be entered within sixty (60) days from the date the opinion of the higher court is recorded in the office of the clerk of the

trial court or from the date of final judgment where the cause is reversed and retired.

Acts of 1865 (Spec. Sess.), ch. 59, Sec. 1 as amended, being Burns' Section 4-7416.

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IN THE

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OCTOBER TERM, 1970

No. 610

INDIANA REVENUE BOARD, ET AL.
Petitioners,

vs.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a Municipal Corporation, and RICHARD M. GIVAN and JOHN F. NEFF,
Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

At pages 7 through 15 of the Respondents' Brief, Respondents present an argument based solely on the proposition that the due-process questions were not presented to the trial court. In this case the trial court was the Appellate Court of the State of Indiana.

On page 9 the Respondents make the following positive statement:

> "Second, under no circumstances can it be said that the federal question of denial of due process was raised at the trial level in this case, and, thus under Indiana law seasonably raised."

The truth is that Federal due-process questions were presented to the trial court on at least three occasions;

(1) On November 14, 1969, these Petitioners filed their Motion for a New Trial which included the following assignment of errors:

> "6. The Court erred in its Order of October 21, 1969, and November 6, 1969, in substituting Trudy Slaby Etherton as Auditor of the State of Indiana and as a member of the Indiana Revenue Board for John P. Gallagher as Auditor of the State of Indiana and as a member of the Indiana Revenue Board one of the judgment defendants on the Court's own motion and without process contrary to the Statutes and Case Law of the State.
>
> "7. That the action of this Court in substituting Trudy Slaby Etherton as Auditor of the State of Indiana and as a member of the Indiana Revenue Board for judgment defendant John P. Gallagher, Auditor of the State of Indiana on its own motion and without process is repugnant to the 'due process clause' of the 14th amendment of the United States Constitution and Article I, Section 12 of the Indiana Constitution."

(2) On November 19, 1969 in the "Response of Auditor of the State of Indiana to Order entered herein on November 19, 1969" the following was presented to the trial court:

> "5. That this affiant is apparently to be joined in this proceeding purely on the Court's own motion by substituting this affiant's name for the name of the judgment defendant John P. Gallagher, as Auditor, contrary to the statutes of the State of Indiana dealing with the substitution of parties as found in Acts of 1881 (Spec. Sess.), Ch. 38, Sec. 848, p. 240, Burns' IND. STAT. ANN. § 2-228.

"6. Affiant further shows the Court that joining this affiant as a party defendant herein without service of process as required by the statutes of the State of Indiana is repugnant to the due process clause of the United States Constitution."

(3) Finally, the Auditor's "Answer to Rule to Show Cause" filed on February 16, 1970 the following was presented to the trial court:

"3. The order of this Court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to the 'due course of law' clause of Art. 1, Sec. 12 of the Indiana Constitution; and the 'due process' clause of the 5th and 14th Amendments of the United States Constitution in that it orders the Auditor of State to issue her warrant and states that the major portion of the money represented is to eventually be turned over to the Mass Transportation Authority of Greater Indianapolis by persons other than the Auditor of State or the Treasurer of State. The Mass Transportation Authority of Greater Indianapolis is a municipal corporation created by Acts of 1967, Ch. 311, which Act was repealed by and which municipal corporation was abolished by Acts of 1969, Ch. 173, Sec. 1003, effective January 1, 1970. Thus there is no recipient for the major portion of the money represented by the warrant.

"4. The order of this Court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to the 'due course of law' clause of Art. 1 Sec. 12 of the Indiana Constitution; and the 'due process' clause of the 5th and 14th Amendments of the United States Constitution in that it orders the Auditor of State to issue her warrant and states that a large portion of the money represented by such warrant is to be turned over by persons other than the Auditor of State or the Treasurer of State to the attorneys of record of the Mass Transportation Authority of Greater Indi-

anapolis who are not parties to this action and whose rights or claims of rights have never been litigated before this Court.

"5. The order of this court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to the 'due course of law' clause of Art. 1 Sec. 12 of the Indiana Constitution; and the 'due process' clause of the 5th and 14th Amendments of the United States Constitution in that it orders the Auditor of State to issue her warrant and states that a large portion of the money represented by such warrant is to be turned over by persons other than the Auditor of State or the Treasurer of State to the attorneys of record of the Mass Transportation Authority of Greater Indianapolis. An order of mandate may be issued against any public officer "to compel the performance of any act which the law specifically enjoins" (Acts of 1881 [Spec. Sess.], Ch. 38, Sec. 804, as amended by Acts of 1911, Ch. 223, Sec. 2). There is not now nor has there ever been any law enjoining the Auditor of State to issue her warrant for money to be so paid.

"6. The order of this court of December 16, 1969, is in excess of the Court's jurisdiction and is repugnant to Art. 10, Sec. 3 of the Indiana Constitution which provides 'no money shall be drawn from the treasury, but in pursuance of appropriations made by law" and Art. 3, Sec. 1 of the Indiana Constitution which provides for the division of governmental powers in that said order attempts to make an appropriation of tax funds.

"And insofar as said order requires this Respondant to violate her oath of office, the Constitution of the State and the state statutes guiding and directing her in performing her duties as Auditor of the State of Indiana, and appropriates the powers of her office, said order is repugnant to the 'due course of law' clause in Art. 4, Sec. 24, of the Indiana Constitution and the 'due process' clause of the 5th and 14th Amendments of the United States Constitution.

"The statutes referred to are as follows:

CRIMINAL STATUTE

Burns' § 10-3715—'If the auditor of state shall draw any warrant upon the treasurer of state, unless there be money in the treasury belonging to the particular fund upon which such order is drawn to pay the same, and in conformity to appropriations made by law, he shall, on conviction, be fined not less than one hundred dollars [$100] nor more than one thousand dollars [$1,000] and be imprisoned in the county jail not less than one [1] month nor more than six [6] months. [Acts 1905, ch. 169, § 520, p. 584.]'

CIVIL STATUTES

Burns' § 49-1809—'The treasurer of state is expressly prohibited from paying any money out of, or transferring any money from, the treasury of state, except upon the warrant of the auditor of state; and the auditor shall examine, with care, every demand and claim presented for payment, and shall be satisfied that every claim is just, legal, and unpaid, before he shall allow, audit, or countersign it; and, for that purpose, may require the affidavit of the claimant, or other evidence; and he shall require every claim to specify the particular items of indebtedness. But when satisfied that any claim is just, legal and unpaid, and if there be money to the credit of the fund, and not before, the auditor shall issue his warrant on the treasurer for its payment out of the proper fund; and if there be money of such fund in the treasury when the warrant is presented, the treasurer shall pay it, but not otherwise; and when paid, the treasurer shall take a receipt therefor on the back, and shall cancel the warrant with a canceling hammer, and shall register, file and preserve the same [Acts 1859, ch. 138, § 7, p. 227.]'.

'Burns' § 49-1810.—The auditor of state shall at no time draw a warrant upon the treasurer of state unless there be money in the treasury belonging to the fund upon which the same is drawn to pay the same, and in conformity to appropriations made by law, and on money actually in the treasury subject to the payment of the same; and the auditor of state shall enter upon his books the number, date, payee, and amount of every draft in favor of the treasurer of state, and properly charge and credit the same to the appropriate fund, so as to keep an exact debit and credit account with each particular fund in the treasury; and the auditor shall carefully file and preserve such claim as his voucher for issuing the warrant. [Acts 1859, ch. 138, § 8, p. 227; 1937, ch. 168, § 1, p. 873.]'

Burns' § 49-1702.—'Duties.—He shall: * * * Fifth. Examine and liquidate the claims of all persons against the state in cases where provisions for the payment thereof shall have been made by law; and when no such provisions, or an insufficient one, has been made, to examine the claim, and report the facts, with his opinion thereon, to the legislature; and no allowance shall be made to refund moneys from the treasury without his statement either for or against the justice of the claim.'

"7. The order of this court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to the 'due course of law' clause of Art. 1, Sec. 12 of the Indiana Constitution and the 'due course of law' clause of the 5th and 14th Amendments of the United States Constitution in the following particulars:

a. The incumbent Auditor of State, who took office on December 1, 1968, was never made a party to the action in mandate decided by this Court on December 31, 1968;

b. The incumbent Auditor of State was introduced into this action without 'the same notice . . . given

in the same manner as required for defendants in the commencement of an action' as required by Acts of 1881 (Spec. Sess.), ch. 38, sec. 848.

c. The plaintiff in this cause neither requested this Court to substitute the incumbent Auditor of State for her predecessor in office nor took any other action that might be appropriate to making the incumbent Auditor of State a defendant in this action in mandate.

d. This Court, on October 21, 1969, without having been petitioned by any party to this action, did, *sua sponte* and without notice, substitute as a party defendant the incumbent Auditor of State for her predecessor in office, all without authority of law.

"8. The order of this court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to Art. 1, Sec. 23, of the Indiana Constitution; Art. 3, Sec. 1 of the Indiana Constitution; and the 'equal protection' clause of the 14th Amendment of the United States Constitution, in that without an appropriation it directs the distribution of general tax funds, belonging to all people of the State of Indiana, to the relator or its successor in interest. In addition, such order, if it is considered as an exercise of the Legislative power, would be Special and Local Legislation under Art. 4, Sec. 22 (7) and Art. 4, Sec. 23, of the Indiana Constitution.

"9. The order of this court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to Art. 1, Sec. 12, of the Indiana Constitution; Art. 4, Sec. 24 of the Indiana Constitution; the 'due process' clause of the 5th and 14th Amendments of the United States Constitution in that said order is now used as an execution against the State without extension of the state's immunity to this respondant.

"10. The order of this court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to Art. 1, Sec. 23, of the Indiana Constitution; Art. 3,

> Sec. 1 and Art. 10, Sec. 1, of the Indiana Constitution; the 'equal protection' clause of the 14th Amendment and the 'due process of law' clause of the 14th Amendment of the United States Constitution, in that it in effect provides that the inheritance tax imposed by state law is to be collected in 91 counties for the benefit of the State and in one county for the benefit of the county, a provision which is adopted by the Legislature would be Special and Local Legislation under Art. 4, Sec. 22 (7) and Art. 4, Sec. 23, of the Indiana Constitution."

At pages 15 to 17 of Respondents' Brief, it is asserted that *Doerech v. Doerech* (1938) 214 Ind. 559, 16 N.E. 877 has been overruled.

That case held that the courts had no power to enter judgment for the attorney of record in the case unless there was a statute granting that power.

Burns' Ind. Stat. Ann. (1968 Repl.), Sec. 3-1216, granted that power in divorce cases.

No such statute exists for mandate actions.

All of the questions raised in Petitioners' Answer to Rule to Show Cause were acknowledged by the Appellate (trial) Court, to be questions previously presented to it. See Petition in Cause 610, Appendix A-6 where the court said:

> "The defenses raised in behalf of the Auditor in the Contempt Proceedings were not new or novel—they were the same issues we have determined before."

CONCLUSION

For the above reasons Petitioners respectfully suggest that a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of Indiana.

Respectfully submitted,

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